Supreme Court of the United States

October Term, 1913.

No. 459. 45.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY,

Appellant,

vs.

JOHN A. HARRISON, AS SHERIFF OF PITTSBURG COUNTY, STATE OF OKLAHOMA, AND PERSONALLY,

Appellee.

BRIEF OF APPELLANT.

161—33 Sup. Appellate—9-19-14

INDEX

CITATIONS REFERRED TO IN BRIEF.

(Citations Continued.)

(Citations Continued.)

Supreme Court of the United States

October Term, 1913.

No. 320.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY,

Appellant.

VS.

JOHN A. HARRISON, AS SHERIFF OF PITTSBURG COUNTY, STATE OF OKLAHOMA, AND PERSONALLY,

Appellee.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

The purpose of this appeal is to review the judgment in the District Court of the United States for the Eastern District of the State of Oklahoma, entered on July 8th, 1912, sustaining the demurrer

of the respondent to the bill of complaint filed in this court by appellee as complainant and directing that said bill be dismissed. By complainant's bill it was sought to enjoin the levy of certain tax warrants which had been placed in the hands of the defendant by the Auditor of the State of Oklahoma, in pursuance to a certain pretended enactment, by the Legislature of the State of Oklahoma, which was entitled " An act for the levy and collection of a Gross Revenue Tax from Public Service Corporations in this State and from persons, firms, corporations or associations engaged in the mining or production of coal, asphalt, or ores bearing lead,zinc, jack, gold, silver or copper, or of petroleum or other mineral oil, or of natural gas; and declaring an emergency, the same having been approved May 26th, 1908 and appearing in the published Session Laws of the State of Oklahoma for 1908, a copy of the said Act together with all amendments thereto being appended to this brief as "Exhibit A."

The bill of complainant in this case was filed on July 19th, 1909, and its allegations disclose facts in substance as follows:

That Choctaw, Oklahoma & Gulf Railroad Com-

pany is a corporation organized and existing under and by virtue of certain acts of the Congress of the United States and that the defendant John A. Harrison, was at the time of the filing of the bill sheriff of the County of Pittsburg, State of Oklahoma; that at the first session of the Legislature of the State of Oklahoma, after its admission into the Union, there was an attempted enactment, the title to which has been hereinbefore set forth, by which tax was sought to be laid upon the gross receipts from the production of coal from coal mines, operated by individuals and corporations within the State of Oklahoma, upon the gross receipts of certain enumerated public service corporations, and also upon the gross receipts of individuals and corporations engaged in the mining of certain other enumerated minerals. One of the provisions of this pretended enactment is that every person, firm, association or corporation engaged in the mining or production within said state, of coal, shall within thirty days after the expiration of each quarter annual period, expiring respectively on the first day of July, October, January and April of each year, file with the State Auditor a statement under oath on forms prescribed by him, showing the location of each mine, or oil or gas

well operated by such persons, firm, association or corporation during the last preceding quarter, the kind of mineral and the gross amount thereof produced, the actual cash value thereof, and shall, at the same time, pay to the said treasurer, a gross revenue tax which shall be in addition to the taxes levied and collected upon advalorem basis upon such mining property and the appurtenances, and equal to two per centum of the gross receipts from the total production of coal therefrom; and that the State Auditor shall have power to require any such person firm, association, or corporation engaged in mining or other production of minerals, to furnish any additional information by him deemed necessary for the purpose of computing the amount of said tax, and to examine the books, records, and files of such person, firm, association or corporation. and shall have power to examine the witnesses; also that the tax provided for against miners and producers of coal shall become delinquent after the date fixed for each quarter-annual report so required to be filed in the office of the State Auditor, and from such time, shall bear, as a penalty for such delinquency, interest at the rate of eighteen per centum per annum.

And it is further provided that where any tax shall become delinquent, the State Auditor shall issue his warrant directed to the sheriff of any county wherein the same or any part thereof accrued and the sheriff to whim said warrant shall be directed, shall preceed to levy upon the property, assets and effects of such person, firm, association or corporation against whom such tax is assessed and sell the same and make return thereof, as upon such execution.

That the Choctaw Coal and Railway Company was organized under the laws of the State of Minnesota on the 28th day of November, 1887, and was empowered among oher things, to mine, sell, market and deal in coal, iron and other ore and the products thereof to buy, lease, deal in and work mineral lands and to build, acquire, maintain and operate roads, ways and railroads necessary or useful in the operation or developement of any mine or quarry owned or operated by it

By the Act of Congress approved February 18th, 1888, the Choctaw Coal and Railway Company was empowered to construct and maintain a railway, telegraph and telephone line through what was then

Indian Territory to certain given points and also to construct and maintain a branch line of railroad to extend from some suitable point on the line of railroad before authorized in a northwesterly direction to the leased veins of the Choctaw Coal and Railway Company situated in what was then Tobuskey County, Choctaw Nation.

That the leased veins and coal mine referred to in the said Act of Congress were coal leases which the Choctaw Coal and Railway Company acquired from various citizens of the Choctaw Nation and which were held by that company at the time of the passage of the said Act. That afterwards by the Act of Congress approved October 1st, 1890, the United States gave its consent to the various coal leases made by the citizens of the Choctaw Nation to the said Choctaw Coal and Railway Company.

That pursuant to its charter and the foregoing leases and Acts of Congress, that Company proceeded to develop coal mines upon the leases mentioned and to construct a railway line connecting therewith for the transportation of the products of said mines and in the prosecution of its work, said corporation became insolvent, and it became necessary for the

United States Government to make some provision for the work undertaken by it to be carried on in order that the leased mines might be operated for the benefit of the Indians as wards of the United States and for the purpose of the development of commerce of the said Territory and among the several states of the Union; that to accomplish said purpose, and to secure the operation of said mines for the benefit of the Indians, and in the interest of Interstate Commerce, the United States Government by the Act approved by Congress, on to-wit, August 24th, 1894, empowered the purchasers of the rights of way, railroads, mines, coal-leasehold estates and other property and the franchises of the Choctaw Coal and Railway Company at any sale made under or pursuant to any decree of court to form a corporation, and vested in said corporation formed all the rights, title, interest, property and claims demanded in law and equity in and to such rights of way, railroads, mines, coal-leasehold estates and property of said Choctaw Coal and Railway Company together with its franchises.

That the United States Government by the Act of Congress approved April 24th, 1896, duly recog-

nized the Choctaw, Oklahoma and Gulf railroad Company, pursuant to the Act of Congress approved August 24th, 1894, and endowed that company with additional powers.

That pursuant to and in accordance with the Acts of Congress, hereinbefore referred to, complainant purchased and became possessed of and vested with all the rights and property of the Choctaw Coal and Railway Company and the additional powers, franchises and rights that were granted to it by the aforesaid Acts of Congress authorizing its organization.

That by the Act of Congress approved on to-wit June 23rd, 1898, commonly known as the Curtis Act, it was provided that the coal mines of the Choctaw and Chickasaw Nations should be under the supervision of two trustees, that all coal mines of the two-Nations developed or thereafter to be developed, should be operated and the royalties therefrom paid into the Theasury of the United States, to be drawn therefrom under rules and regulations prescribed by the Secretary of the Interior.

By the said Acts, all contracts which had theretofore been made with the National Agent of the

Tribes for operating coal mines which were, on the 23rd day of April, 1897, being operated in good faith were ratified and confirmed and the lessees of said contract given the right to renew the same, that pursuant to said so called Curtis Act, the Choctaw, Oklahoma & Gulf Railroad Company applied to the Trustees of the Choctaw and Chickasaw Nations for the execution of new leases covering its leasehold interests in said Indian Territory as provided for by said Act, and filed with its said application a correct description and maps of all of its said coal leases, numbering the same from 1 to 30 inclusive; that thereafter, in accordance with such application, the mining Trustees of said Choctaw and Chickasaw Nations executed and delivered to the Choctaw, Oklahoma and Gulf Railroad Company, 30 leases of approximately the same lands as were embraced in the leases assented to by the Acts of Congress approved on, to-wit October 1, 1890.

That the terms and conditions of each of said leases were substantially the same and that they were executed under certain rules and regulations promulgated by Secretary of the Interior. That prior to March 24th, 1904, complainant had pur-

chased and was possessed of certain named lines of railway of many thousand miles in extent, and that complainant prior to March 24th, 1904, pursuant to its charter and rights and duties, had located, developed and was operating six mines at a cost of a million dollarfs upon the leaseholds mentioned.

That all of said mines were along or adjacent to the rights of way of its line of railway and were connected therewith by branch tracks. That complainant by virtue of its charter rights and the acts above mentioned, is possessed of the commingled right to own and operate its railroad and said coal mines in conjunction with each other.

And that the right to operate said coal mines is a vested right arising from and supported by the contract between it and the Federal Government and that these ar erights of which complainant cannot be deprived without just compensation and without process of law. That the State of Oklahoma is without right, power or authority to impair the obligation of such contract by imposing any license upon the exercise of the right.

That the lands upon which the coal mines are operated by complainant are the property of the

Choctaw and Chickasaw tribes of Indians and are located and situated within the geographical limits of what is known as the Choctaw Nation and upon the segregaed and unallotted lands of said nations. That the title to said segregated and unallotted lands is still in the Choctaw and Chickasaw tribes of Indians. That by the agreement known as the Atoka Agreement, approved by the Act of Congress of June 5th, 1898 and appearing as Section 29 thereof, it was provided that all the coal and asphalt lands within the limits of the Choctaw and Chickasaw Nations should remain and be the property of the members of those tribes of Indians and that no patent provided for by any Act of Congress or by the Atoka Agreement should convey any title thereto and that the revenue derived therefrom should be used for the education of the children of Indian blood of the members of said tribes.

That it is further provided by said Act and agreement that all the leases of coal lands should be subject to the approval of the Secretary of the Interior of the United States and all moneys and royalties derived from said leasing of said coal lands should be paid into the Treasury of the United States.

That by the provisions of the Act of Congress entitled " An Act to enable the people of Oklahoma and Indian Territories to form a constitution and state government and be admitted in to the Union on an equal footing with the other states, etc.," it is specifically provided that nothing contained in the Act and Constitution should be construed to limit or impair the rights of person or property pertaining to the Indians of said Territory so long as the rights should remain unextinguished or to limit or affect the authority of the United States to make any law or regulation respecting such Indians, their lands, property or other rights, by treaties, agreement, laws or otherwise which it would have been competent to make if that Act had never been passed. It is further provided in said Enabling Act that the people inhabiting the proposed state agree and declare that they forever disclaim all right and title in and to lands lying within said lands owned or held by any Indian tribe or nation, and until the title to such public lands shall be extinguished by the United States, the same shall be and remain and continue to remain subject to the juridiction, disposal and control of the United States, and that by the

Constitution of the State of Oklahoma, the foregoing provisions of the Enabling Act are adopted.

That inasmuch as the State of Oklahoma, by its Constitution renounced all control and jurisdiction over the lands of the Choctaws and Chickasaws and inasmuch as by the Enabling Act, Congress reserved for itself the exclusive right to legislate in regard to coal lands of said tribes of Indians and has reserved the exclusive jurisdiction over the same, the state of Oklahoma has no power through its legislature or other governmental agency to interfere with the operation of said coal lands under the Federal leases mentioned and that the action of the officers of the State in attempting to levy and collect the tax complained of is in violation of the Federal Law and of the Constitution and laws of Oklahoma.

That said pretended enactment of the Legislature of Oklahoma under which the defendant is claiming to act, is in violation of the Fourteenth Amendment to the Constitution of the United States and of the Constitution and laws of the state of Oklahoma, in that the tax sought to be collected is in its nature and effect confiscatory and will have the effect of destroying complainant's business and will

prevent it from discharging its obligation to pay royalty under its leased contracts, as aforesaid.

That if the tax is enforced it will prevent the complainant from earning a reasonable profit on its investment and cause it to run its coal business at a loss.

That said Act is viod because contrary to and in violation of Section 19 of Article 10 of the Oklahoma Constitution which provides "That every Act enacted by the legislature and every ordinance and resolution passed by any county, state, town or municipal board or local legislative body levying a tax, shall specify respectively the purpose for which said tax is levied or collected and no tax levied or collected for one purpose shall ever be devoted to another purpose."

The complainant avers that neither the purpose for which the tax sought to be collected or the fund to which it shall be credited, is anywhere stated in said pretended enactment or in any other act or legislation of the State of Oklahoma.

That complainant, during all of the time of the existence of its coal leases, was, and still is, by duty

bound to work, operate, sell and transport the products of said mines in accordance with said leases and in accordance with the several acts of Congress governing the same, and in pursuance of its said duty, has been and still is, working and operating said mines and marketing the products thereof.

That from and including the year 1900 to and including the year 1908, it mined and marketed from said leased mines approximately five million eight hundred thousand (5,800,000) ton of coal. That it paid royalties for the benefit of the Choctaw and Chickasaw Nations thereon approximately four hundred and sixty-three thousand three hundred and sixty-two dollars ($463,362.00). That it has at all times mined and marketed and still is mining and marketing an amount of coal in excess of the minimum required by said lease.

That on March 16th, 1908 complainant entered into a contract of agency with the Rock Island Coal Mining Company, an Oklahoma corporation, by the terms of which said Coal Company as the agent of complainant, assumed and agreed to work and operate said mines and market the production thereof for a commission of five cents per ton.

That complainant is and has been since said date working and operating its mines and marketing its products through its said agent. That by its said contract, complainant bound itself to pay all expenses of every kind relating to the operation of said mines and to the transaction of the business of said agency; that said coal company from May 26th, 1908, to November 26th, 1908, inclusive, operated said mines under said agreement and produced therefrom in said time two hundred and twelve thousand three hundred and seventy-one and fifteen hundredths ($212,371.15) tons of coal and derived from the sale thereof the sum of five hundred and seven thousand, six hundred and sixty-one and eleven hundredths ($507,661.11) dollars. That complainant has at all times disputed and now disputes the validity of said pretended statute and denies the right of all persons to collect said tax, but for the convenience of the said State Auditor of Oklahoma, caused a report to be made to him and the amount of proceeds therefrom to be made to him at the same time advising him of its intention to protest the validity of said statute and the right to collect said tax.

That the said State Auditor in the performance

of what appeared to him to be his official duty, claimed that the Rock Island Coal Mining Company should pay the sum of $16,939.11 and by reason of said production, the revenue derived therefrom and has in pursuance of said pretended statute, issued his warrant directed to the said defendant, as sheriff of said county, commanding him to levy upon the property, assets and effects of the said company against whom said tax is claimed, and to sell the same and make return thereof as upon execution.

That the Rock Island Coal Mining Company has no property except properties of said complainant, placed in its possession for use in the performance of its said agency contract and the coal produced by it from the mines under said contract and that complainant under the terms of its agreement is bound to pay all expenses of operating said mines, including taxes, and would, if the payment of the pretended tax is enforced, be compelled to lose the same.

That defendant in pursuance of his official duty, as it appeared to him, threatens and is about to levy the said tax warrant upon said property so placed in the hands of said Coal Mining Company

by said complainant and if permitted to do so, will levy upon said properties and will make pretended sale thereof and thereby the properties of said complainants will be scattered amongst various and different purchasers at such unlawful sale, who will claim title and ownership by virtue of such sale and thereby complainant will be compelled to resort to numerous actions at law and suits in equity to protect said property and that complainant has no adequate remedy at law for the wrongs about to be inflicted.

That all the property of said complainant subject to taxation has been assessed at full value for the full period of time for which said pretended tax is claimed.

The prayer to the bill of complaint is for a temporary injunction pending the litigation and that the pretended tax sought to be laid as described in said bill, be set aside and held for naught and for general relief.

A temporary restraining order was issued on July 19th, 1909. Thereafter on Nov. 1st, 1911, defendant filed a demurrer to the said bill of com-

plaint, which demurrer was general in form. Thereafter the cause was submitted for decision on the demurrer of the defendant, on briefs filed, and on July 1st, 1912, the Judge of the District Court, filed in said cause an opinion in writing sustaining the demurrer to the bill of complaint, and dismissing the bill for want of equity and dissolving the temporary injunction.

Thereafter on July 8th, 1912, a decree in accordance with said opinion was duly entered from which this appeal is prosecuted.

THE SPECIFICATIONS OF ERRORS.

I. The said District Court erred in sustaining the demurrer to the bill of complaint, and dismissing the bill and granting the motion of the defendant to dissolve the temporary injunction, in the following respects:

A. The said Court erred in sustaining the valirity of the act of the Legislature of the State of Oklahoma, approved May 26th, 1908, for the reason that said act is in contravention of the constitution of the United States, in that it imposes a burden upon instrumentalities of the Federal Government.

B. Said court erred in holding that in the execution of the several contracts between the trustees of the Choctaw and Chickasaw Nations, and complainant, it is not constituted a federal instrumentality.

C. That said court erred in holding that the tax sought to be laid under said act of the Legislature of the State of Oklahoma approved May 26th, 1908, is a tax on property.

D. The said court erred in holding that the tax laid under said act of the Legislature of the State of Oklahoma, is too remote an inference with a federal agency to come within the prohibition against such inferences.

E. The said court erred in sustaining the validity of the act of the Legislature of the State of Oklahoma, approved May 26th, 1908, for the reason that said act is in contravention of the constitution of the United States, especially Sec. 8, of Art. 1, thereof, providing that Congress shall have power to regulate commerce with foreign nations and among several states, and with Indian Tribes.

F. That said court erred in sustaining the va-

lidity of the act of the Legislature of the State of Oklahoma, approved May 26th, 1908, for the reason that said act is in contravention of the constitution of the State of Oklahoma, especially Sec. 3, Art. 1, and Secs. 6 and 19, of Art. X, thereof, a copy of which is appended to this brief and marked Exhibit B.

QUESTIONS INVOLVED IN THIS CONTROVERSY.

I. Is complainant, appellant here, by reason of the Curtis act (30 Stat. 505) and the execution of leases described in the bill in pursuance thereof, while engaged in the mining of coal on the segregated lands of the Choctaw and Chickasaw nations, constituted a federal instrumentality?

II. Is the tax laid by the act of May 26, 1908, as amended by the act of March 27, 1909, a property tax, or an excise upon the right to engage in business of mining?

III. May the tax prescribed by the said act, be enforced as against the gross receipts from complainant from coal produced in the operation of mines on the segregated coal lands of the Choctaw and Chickasaw nations?

IV. May the tax prescribed by the act of May 26, 1908, be laid against that part of the gross receipts enuring to complainant from the operation of mines on the segregated Indian coal lands of the Choctaw and Chickasaw Nations, required by the Curtis Act, and by the leased agreements thereunder, to be paid into the Treasury of the United States, for devotion to the education of children of Indian blood of members of said tribes?

V. Is the said act of May 26, 1908, void because in contravention of Sec. 6 of Art. 10 of the Oklahoma Constitution, which provides that such property as may be exempted by reason of any treaty stipulation existing between Indians and the United States government or by Federal laws should be exempt from taxation in said state during force and effect of such laws or treaties?

VI. Is the act of May 26th, 1908, void because in contravention of Sec. 19, of Art. 10, of the Oklahoma Constitution, which requires that every act of the legislature levying a tax, shall distinctly specify the purpose for which said tax is levied?

I.

The first, second and third questions presented

for consideration of this court are so closely allied that we deem it advisable to consolidate the same in this discussion and accordingly, the first proposition to which we desire to direct the attention of the court is whether or not the lower court erred in sustaining the validity of the act of the Legislature of the State of Oklahoma, approved May 26th, 1908, for the reason that said act is in contravention of the constitution of the United States, in that it imposed a burden upon the instrumentality of the Federal Government.

The bill of complaint in this case was filed in the Circuit Court of the United States on July 19th, 1909. By it was sought an injunction restraining the sheriff of Pittsburg County from executing certain tax warrants placed in his hands by the Auditor of the State of Oklahoma, for collection of Sixteen Thousand, Nine Hundred Thirty-Nine Dollars and Eleven cents ($16,939.11) accrued under the said act of the Oklahoma Legislature, and which the sheriff was about to levy upon the property of complainant including coal so mined, in the hands of its agent, the Rock Island Coal Mining Company. A temporary restraining order was issued on the same day and remained in force until the final de-

cree, dismissing bill on July 18th, 1912.

Subsquently, on March 27th, 1909, the Act of the Legislature of Oklahoma, referred to, was amended so as to change the rate of the tax.

After filing of the bill in this cause, and issuance of temporary restraining order, the Act of May 26th, 1908, was further amended, by the Act of March 10th, 1910, so as to exclude from the receipts upon which the tax was required to be computed, all payments to the government on account of royalties for the benefit of Indian citizens, Tribes, and Landlords.

That portion of the Act as thus amended relating to the taxation of express companies was under consideration by this Court, in the case of *Meyer, Auditor of the State of Oklahoma, vs. Wells Fargo & Company*, 223 U. S., page 298, wherein it was held that the tax provided by this act in so far as it affected express companies was not a property tax but a tax on all revenue, including that received from interstate commerce, and as such, was an unconstitutional burden on the interstate commerce, and the decree of the Circuit Court enjoining enforcement of a levy thereunder, was sustained.

The act, as amended with respect to the levy of the tax therein provided against receipts from coal production, was the subject of a suit instituted in the District Court of the United States for the Western District of Oklahoma, and in which an injunction was awarded against the collection of the tax thereunder, for the reason that it operated as a burden upon a federal instrumentality. See *M. K. & T. Ry. Co. vs. Meyer, Auditor of State of Oklahoma,* 204 Fed. Pg. 140. So that we approach the subject of the nature of the tax, and the effect of its imposition upon the properties of the complainant in this cause in the light of these adjudicated cases.

The tax is called a gross revenue tax in the title of the act, and is measured by the gross receipts from the production of coal in certain given quarter annual periods. It is difficult to determine whether or not the tax is correctly named but the State Constitution, Sec. 12, Art. 10, authorizes the levy and collection of license, franchise, gross revenu excise, income collateral and direct inheritance, legacy, and succession taxes; also graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes, also

stamp, registration, production or other specific taxes. It becomes unimportant, however, to determine with definiteness the correct name of the tax as this court will look beyond the name to the results and determine the validity of the tax by the application of that test, as is said in *G. H. & S. A. Ry. Co. vs. Texas*, 210 U. S., Pages 217, 227, "Neither State Courts nor the Legislature, by giving tax a particular name or by the use of some form of words can take away our duty to consider its nature and effect."

With that rule for guidance and looking to the effect of this tax it will be seen that it is a tax on production; that is, on the act of producing, and to that extent it is a tax upon the privilege of doing the business. Anyone may escape the tax by omitting to avail himself of such privilege. The averments of such bill showed that the tax provided by the intended amendment is sought to be laid upon the gross revenue *eo nomine*, and is in addition to taxes levied upon an ad valorum basis upon the property and appurtenances of the complainant. Therefore it is not a property tax but is more nearly an excise upon the right to do or upon the engage-

ment in the undertaking, or upon the operation of the business since it is laid upon gross receipts or gross revenue from production. It is not laid upon gross receipts or gross revenue as property, such as money or credits, nor is it laid upon gross receipts from all sources, but only upon gross receipts from the production of coal.

By Sec. 8, Art. 10, of the Oklahoma Constitution it is provided that all property which may be taxed ad valorum shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. And by Sec. 9 of the same article a limit of three and one-half mills for state purposes is placed upon the levy of taxation upon ad valorum basis. So that, aside from the express language of the statute itself, which declares that the tax provided thereby is in addition to taxes levied on ad valorum basis, on such mining oil or gas property, and the appurtenances thereunto belonging, we find a positive requirement of the fundamental law of the state requiring that property as such be assessed on an ad valorum basis, and as to such taxation there is a fixed limit of levy. Furthermore, all property as such is required to be as-

sessed at its fair cash value, estimated at the price it would bring at a voluntary sale, and by a statute in force at the time of the filing of the bill of complaint in this cause all taxable property, real and personal, was required to be listed and assessed each year at its fair cash value, estimated at the price it would bring at a voluntary sale, and in the name of the owner thereof on the first day of March, and in the case of stocks, goods, wares and merchandise, upon the average amount of same for the preceding year, ending March 1st. (Chap. 38, Art. 2, Session Laws 1909.) So that clearly the imposition sought to be laid by the act attacked is not a tax upon property as such, under the laws of Oklahoma.

It is to be noted in this connection that by the language of the act the tax therein provided is laid against persons, firms, corporations or associations engaged in mining or the production of coal, etc., and a particular declaration that the term "person" includes individuals, partnerships, associations and corporations in the singular as well as in the plural number appears in the act. Thus it is demonstrated that the excise sought to be laid by the act is not upon the right to be, since the right to be is

inherent in an individual and the tax is laid equally against natural and artificial persons. An act of June 17th, 1910, Revised Laws of Oklahoma, Sec. 7538 *et seq.*, imposes a license fee or tax of fifty cents for "each thousand dollars of authorized capital stock or less" of domestic corporation, and one dollar for each thousand dollars of capital stock employed in its business done in the state. Provided, that the license fees provided for in this article shall not be required on that portion of its capital stock employed by any corporation to any business upon which a production, income or gross receipts tax is required to be paid under the laws of the state"—Comp. Laws 1910 (Harris Day,) p. 2050. This furnishes a contemporaneous legislative construction of the gross production tax—as "upon the business." In this case, as it appears on the face of the bill, even if the tax could by any process of reasoning be construed as an excise on the right to be or upon the granting of a right of franchise, it is clearly shown that this complainant does not derive its right to exist as a corporation from the State of Oklahoma or by virtue of its laws. On the contrary, as is clearly alleged, complainant is a corporation organized by an act of the Congress of the United

States, and by engaging in mining coal from the segregated coal lands of the Choctaw and Chickasaw Indian Nations, it is carrying into effect the express purposes for which it was incorporated by the Act of Congress.

Furthermore, by virtue of the laws in force in the State of Oklahoma at the time o fthe filing of the bill in this cause, all corporations organized or existing or doing business in the State of Oklahoma for profit, other than public service corporations and banks, are required to be assessed upon the net value of their monied capital, surplus and profits, as the same existed on the first day of March of each year, less existing valuation of any real estate located in this State and owned by such corporation and listed separately for taxation. Chap. 38, Art. 2, Sec. 12, Session Laws 1909. So that the excise sought to be laid by the act attacked, being by the express terms of the act itself limited to gross receipts from production in given periods, is in effect, if not in name, an excise upon the right to do the business, i. e., to produce the coal from which receipts are derived.

The language of the act is, each person, firm,

association or corporation engaged in the mining, or production of coal, shall "pay to the State Treasurer a gross revenue tax, which shall be in addition to the taxes levied, and collected upon an ad valorum basis, based upon such mining, oil, or gas property and the appurtenances thereunto belonging, equal to two per centum of the gross receipts from the total production of coal therefrom." With the exception of the rate of the levy and the fact that in the one instance the tax applies to the act of producing coal and in the other to the transaction of transportation business, that portion of the act which was before the court in the case of *Meyer vs. Wells Fargo & Co.*, 223 U. S. 298, is identical, and as is said therein, "the tax is 'in addition to the taxes levied and collected upon an ad valorum basis' even if we read the words which follow without a comma, 'upon the property and assets of such corporation,' as not qualifying those which immediately precede but as attempting to characterize gross revenue tax as a tax upon such property and assets, nevertheless all property and assets are subject to ad valorum taxes referred to. Therefore this tax cannot be an attempt to reach the value of what is by the law to be valued and taxed in a different way."

And as is said in the case of *G. H. & S. A. Ry. Co. vs. Tex, Supra,* "the distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself." * * * This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'"

Excises like the one involved in this cause are not new to the law, but the courts have often been called upon to determine the constitutionality of the enactments therefor, as well as the effect of such taxes. In the early case of *Philadelphia etc., Mail S. S. Co. vs. Pennsylvania,* 122 U. S. 326, 30 L. Ed. 1200, 1203, this Court, speaking through Mr. Justice Bradley, said:

> "The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the Company, dollar for dol-

lar. It is those specific receipts, or the amount thereof, which is the same thing, for which the Company is called upon to pay the tax. *They are not taxed only because they are money, or its value, but because they were received for transportation.* No doubt a shipowner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden up it, and seriously affects it." In *James C. Fargo, etc., vs. Wm. C. Stevens, etc.*, 121 U. S. 230, 30 L. Ed. 888, it is said:

"A state statute which levies a tax upon the gross receipts of railroads for the carriage of freights and passengers, into, out of, or through the state, is a tax upon commerce among the states, and therefore void.

"While a State may tax money actually within the State after it has passed beyond the stage of compensation for carrying persons or property, as it may tax other money or property within its limits, a tax upon receipts for this class of carriage specifically is a tax upon the commerce out of which it arises; and, if that be

interstate commerce, it is void under the Constitution."

Later cases to the same effect are *Ratterman vs. Western Union Telegraph Co.*, 127 U. S. 411; *Western Union Tel. C. vs. Pennsylvania*, 128 U. S. 139; *Western Union Tel. Co. vs. Sea*, 132 U. S. 472; *Pullman Palace Car Co. vs. Pennsylvania*, 141 U. S. 18, 25; *Ficklen vs. Taxing District of Shelby Co.*, 145 U. S. 1, 22; *New York, Lake Erie & Western Ry. vs. Pennsylvania*, 158 U. S. 431, 438; *McHenry vs. Alford*, 168 U. S. 651, 670, 671; *Atlantic & Pacific Telegraph Co. vs. Philadelphia*, 190 U. S. 160, 162; *Western Union Telegraph Co. vs. Kansas*, 216 U. Pages 1, 24, 25.

Several states of the Union have likewise had occasion to consider excises of the nature involved in this cause and as being particularly applicable to the question now presented. We call to the court's attention the case of *Southern Building and Loan Assn. of Knoxville vs. Norman*, 32 Southwestern 952, wherein the Court of Appeals of Kentucky in construing a tax levied upon the gross receipts of a Building and Loan Assn., said:

"It is said that the imposition of the levy of two per cent on the gross receipts of the association is not in the nature of a license tax, because, as those terms imply, such a tax is enforced to obtain a license to do business in the

future, and cannot, in the nature of things, be an exaction on past business. A license, it is said, is a permission, and the payment of a license tax proper is required as a condition precedent to doing a business otherwise prohibited. It is not an income tax, because the company has no property out of which an income arises; and it is not a franchise tax, it is said, because the state has granted no franchise, that being a grant of another sovereignty. The conclusion is reached, therefore, that the statute imposes a tax on the business of the association.

"Certainly it is not an ad valorum tax. The associations of the kind described generally have no tangible property within the state, and we do not regard the purpose of the statute to be to force an artificial situs on the obligations due the association from its members for stock, dues, etc. Indeed, those contracts cannot be said to have any certain value. The members owe the contracts of subscription, it is true, but upon notice these may retire from membership, and withdraw the value of their payments, subject to conditions not necessary to notice. The business nevertheless is a valuable one, and it is for the privilege of doing this business that the tax is imposed. *It is not a tax on the corporate franchise for the conclusive reason that the state does not grant this, but it is a tax on the franchise of doing business in this state and in this sense a franchise tax.* It is true, the amount of the gross receipts of the company are taken as the measurement of the tax, but this is only the adoption of a fair and just standard. Such taxes may be measured by div-

idends, by the amount of the capital stock, by the extent of the business transacted, by the net earnings, by the gross receipts, etc. In the earlier cases a tax upon the gross receipts of a railroad was held not to be a direct tax on the property, but a tax upon the franchise of the corporation measured by the extent of its business. *State Tax on Railway Gross Receipts*, 15 Wall. 284. But subsequently the same court, in *Fargo vs. State*, 121 U. S. 230, 7 Sup. Ct. 857, and *Philadelphia and S. S. S. Co. vs. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, modified or rather denied the right of the state to thus tax an interstate agency under such a guise."

In *Fidelity and Casualty Co. vs. City of Louisville*, 50 S. W. 35, a tax levied upon gross receipts by the insurance company from premiums in the City of Louisville, is construed to be "A tax on the right to do business in the City of Louisville, and is a franchise taxed to that extent," and in this case the language used in *Association vs. Norman, Supra*, is reiterated with approval.

The Supreme Court of Maryland, in *State vs. Philadelphia, W. & B. R. Co.*, 45 Md. 361, 24 Am. Rep. 511, held that a tax laid annually upon the gross receipts of all domestic steam railroads, doing business in the state, was not a tax upon their property, but upon their franchise, measured by the extent of their business.

The Western Union Tel. Co. vs. St. Bd. of Assessments, 80 Ala. 273, 60 Am. Rep. 99, it was held: A percentage tax upon gross receipts on every telegraph, telephone, electric light and express company, derived from business done by it in the state, was not one upon property, but upon occupation. This case was reversed by the Supreme Court of the United States, in 132 U. S. 472, upon the ground that in its application to the Western Union Telegraph Company, the tax was in conflict with the commerce clause of the Federal Constitution in that it imposed a burden upon interstate commerce.

We do not overlook, in presenting this argument, the decision by the Supreme Court of Oklahoma of the case of *McAlester-Edwards Coal Co. vs. Trapp,* 114 Pac. 794, wherein it is held that the tax laid by the act attacked is one upon property and not an excise. However, in view of the fact that there is involved in this controversy a right arising by reason of Federal law, and in view of the explicit declaration of the well settled doctrine contained in the case of *G. H. & S. A. Ry. Co. vs. Texas,* 210 U. S. p. 217, 227, wherein it is said, "Neither state courts nor the legislatures by giving a tax a particular

name, or by the use of some form of words, can take away our duty to consider its nature and effect," it is entirely clear that this question is not by that decision foreclosed. *Ohio tax cases,* 232 U. S. 576.

Furthermore, the decision of the Oklahoma Supreme Court in this case is but the declaration of the effect of the act and not a construction, strictly speaking, thereof. The conclusion reached by that Court is, as appears from the face of the opinion itself, based upon a palpable misconception of the effect of the tax laid by the Act. This being true, the decision is not controlling on this court, as is laid down in the case of *Town of Venice vs. Murdock,* 92 U. S. 494.

The cases herein before referred to clearly demonstrate the nature of the tax laid by this enactment, and some of those cases are cited in the opinion of the Oklahoma Supreme Court as sustaining its conclusions, but in this we submit the court has fallen into error. In the case of *Union Pacific Ry. Co. vs. Penniston,* this court while holding that the property as such, of a corporation performing a function of the government, is subject to taxation by the State, expressly held that "a tax upon their

operations is a direct obstruction to the exercise of direct federal powers," and such is the holding of the case of *Thompson vs. Union Pac. Ry. Co.*, 9 Wallace 579.

Stress is laid in the opinion upon the case of *Baltimore Shipping Co. vs. Baltimore*, 195 U. S. 375, but the facts of the case are so different from those disclosed by the bill in this case, as to render it of no effect as authority herein. The court will bear in mind that the Curtis Act and the leases under which complainant operates the mines on the segregated coal lands of the Choctaw and Chickasaw tribes, requires complainant to exercise diligence in the operation of the mines, that they may be developed to the fullest extent possible. By the direct terms of that act the operation of these mines is under the supervision of trustees named by the President, and is subject at all times to rules and regulations prescribed by the Sec. of Interior. The fund arising from the operation of the mines enuring to benefit of Indian Tribes is required to be turned into the U. S. Treasury and disbursed in the furtherance of a duty owing by the Federal Government to the Indian tribes, i. e., the education of children of Indian blood of such tribes.

Two purposes of the government were sought to be served by the enactment of the Curtis law, and execution of contracts with complainant thereunder. First, the development of property in Indian Nations, and Second, the education of children of Indian blood of such nations. That the complainant itself, a federal corporation, empowered by an Act of Congress creating it to operate these particular mines, is an agent of the government to attain the ends stated, and not merely engaged in the business for profit, seems too clear to admit of argument, for by the very terms of the contract, under which it is operating the mines, it is required to operate them to the fullest extent possible, whether it profits or not, and to pay to the government the royalties stipulated.

The case of *B. & O. Ry. Co. vs. Ditty*, 232 U. S. 576, cited as an authority in the opinion of Oklahoma Supreme Court, clearly shows that a tax of the character involved in this action is an excise and not one on property. The opinion in the case of *in re Assessment of Indian Terr. Illuminating Oil Co.*, cited in the opinion of the Oklahoma Supreme Court, has since been withdrawn and is no longer an authority.

The conclusion of the Oklahoma Supreme Court that the tax as upon a Federal instrumentality is too remote to directly affect it, is refuted by every allegation in the bill of complaint herein from which we shall hereinafter show it clearly appears that complainant's ability to perform the duties imposed by the Curtis Act, and contracts, will be materially impaired by the imposition of this excise.

So that regardless of the conclusions expressed in the opinion of the Oklahoma Supreme Court it is insisted that the allegations of the bill of complaint in this cause, viewed in the light of the cases cited, particularly *G. H. & S. A. vs. Texas*, 210 U. S. 217, *Ohio Tax Cases*, 232 U. S. 574, *and Meyer vs. Wells Fargo*, 223 U. S. 298, clearly demonstrate that the tax sought to be enjoined is an excise upon the operation of the business of mining coal, which in so far as this appellant is concerned, as we will further endeavor to show, is invalid.

ATOKA AGREEMENTS.

It is known by the court that on April 23rd, 1897, an agreement known as the Atoka agreement, was entered into between the Commission to the Five Civilized Tribes and duly authorized represen-

tatives of the Choctaw and Chickasaw Tribes of Indians, which agreement was subsequently ratified and confirmed by the Act of Congress, approved on June 23rd, 1898, and commonly known as the Curtis Act, wherein it was provided, among other things, that the coal and asphalt in or under the lands allotted and reserved for allotment should be reserved for the sole use of the members of the Choctow and Chickasaw Tribes, exclusive of freedom, so that each and every member should have an equal and undivided interest in the whole. That the revenue from coal and asphalt should be used for the education of the children of Indian blood of members of said tribes and that all coal and asphalt mines, then in operation or thereafter leased and operated, should be under the supervision and control of two trustees appointed by the President of the United States, and that all royalties from the operation of such coal and asphalt mines should be paid into theTreasury of the United States and drawn therefrom under rules and regulations prescribed by the Secretary of the Interior.

It is shown by the allegations of the bill that the the complainant was incorporated under an Act

of Congress and expressly authorized by Congress to engage in the mining of coal from the lands which the government held in trust for its Indian wards and prior to the Curtis Act, ratifying the Atoka agreement, this complainant had been engaged in mining coal from lands of the Choctaw and Chickasaw Nations under such express authority and also under leases taken from individual members of the tribes, which were properly confirmed by authorized governmental agents. That subsequent to the passage of the Curtis Act, all of the leases then held by the complainant were surrendered and cancelled and in lieu thereof, new leases, numbered from one to thirty, were executed by the mining trustees appointed as aforesaid, and delivered to complainant. That under these last leases complainant has been operating its mines upon said lands and has paid large sums of money into the Treasury of the United States as royalties upon such operation, and for the benefit of the Choctaw and Chickasaw Indians, as provided in the Atoka agreement.

By this agreement, the government undertook to supervise, through its trustees, the mining of coal

and asphalt, specifically reserved from allotment or other disposition, and to devote the revenue received therefrom to the education of the children of Indian blood of the members of said tribes. The agreement on the part of the Government by necessary implication involved the duty to operate the mines, for without operation there could be no revenue. To perform the duty thus imposed upon it, the government, through its trustees, entered into agreements of lease and contracts of operation with the complainant, whereby complainant was to operate mines upon the lands so reserved by the Government and from the revenues arising therefrom pay to the Government stipulated royalties, which were to be devoted to the uses aforesaid. In these lease agreements and contracts the Government performed, through complainant, as its agent, a duty imposed upon it in its agreement with the Indians, and therefore, in the conduct of the mining operations, in the production and sale of the coal and in accounting for the revenue thereby raised, this complaint is a Federal instrumentality.

The power of the government over the Indians and their property located in the Indian Territory

is plenary and therefore there can be no question as to the authority of the Government to enter into an agreement with the Choctaw and Chickasaw tribes, in the first place, to supervise the operation of mines located on the coal and asphalt lands of those tribes, which lands had been by the government reserved from allotment.

In the recent case of *Tiger vs. Western Investment Co.*, p. 286, at 310, it is said:

> "In the *United States vs. Rickert*, 188 U. S. 432, Mr. Justice Harlan, speaking for the court, said:
>
> 'These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life and ultimately the privileges of citizenship.'
>
> "To the same effect have been the decisions of Circuit Courts of Appeals dealing with this subject."

Neither can there be any question of the authority of the government, in pursuance of such agree-

ment, to promulgate rules and regulations under which such mines might be operated and by which was provided the amount of time when and depositories to which royalties from such operations should be paid. These and numerous other regulations concerning the operation of these mines were promulgated by the Secretary of the Interior, acting in behalf of the general government, and of which this court will take judicial knowledge.

By a reference to these rules and regulations the court will observe that complainant, appellant here, was required to exercise diligence in the operation of the mines and to operate the same in a workmanlike manner to the fullest possible extent. And that complainant is required to pay annually to the government, stipulated sums as advance royalties for each and every mine or claim within the lease agreements and contracts. It will be further observed that the complainant cannot sublet the premises covered by said leases, but that a transfer of the leases may be made only after approval of the government officials. It will be further observed that the complainant is compelled to operate the mines on said leases and cannot discontinue such operations.

The agreements of lease between agents of the government and complainant, in view of the regulations promulgated by the Secretary of the Interior result in such a relation as constitutes complainant an instrument of the government for the purposes expressed, i. e., the development of mineral resources of the Choctaw and Chickasaw Nations—wards of the nation—and the devotion of the profits from such operations enuring to such tribes to the education of the children of Indian blood thereof. Therefore, it is earnestly urged that any attempt on the part of the State to impose an activity tax or other burden or restriction upon operations under such agreements, would impair the efficiency of an instrumentality of the government in this regard. The allegations of the bill clearly show that the imposition of two per cent of the gross receipts from operations would have the effect to destroy the ability to promptly and properly discharge obligations under such contract. If the state can impose a tax of two per cent upon the right of this complainant to mine coal from such segregated Indian lands, its power to demand twenty per cent or one hundred per cent is just as clear, since, as has

been frequently declared by th ecourts, the powers to tax is the power to destroy. *McCullough vs. Maryland,* 4 Wheat. 316, 4 L. Ed. 579. And the reasonableness of an excise or privilege tax, unless some Federal right is involved, is with the discretion of the State Legislature. *Ohio Tax cases,* 232 U. S. 576.

The bill alleges that the complainant was incorporated under an Act of Congress, and expressly authorized by Congress to engage in the mining of coal, also that the coal lands from which the coal is mined are held by the government in trust for its Indian wards. The complainant is, therefore, both by an Act of Congress and under the leases, as much a Federal instrumentality in the mining of coal as in the transportation of passengers and goods, and this case comes directly within the doctrine declared in *State vs. T. & P. Ry. Co. (Texas),* 98 S. W. Rep. 834, and *California vs. Central Pacific Ry. C.,* 127 U. S. 1, and a long line of other cases declaring the same principles, including the case of *G. H. & S. A. Ry. Co. vs. State,* 210 U. S. 217. It is only necessary to call attention to the points decided in the first mentioned case, now well settled, that a

state will not be permitted to burden or restrict by tax, or otherwise, the performance of a duty or exercise of a privilege prescribed or granted by the general government. In *G. H. & S. A. Ry. Co. vs. State Supra,* it is said: "The state must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. * * We are of the opinion that the statute levying the tax does amount to an attempt to regulate commerce between the states." This is just as much an attempt to regulate and tax the business of mining coal on segregated Indian lands, and the allowance of the privilege would be just as dangerous.

In the early and celebrated case of *McCullough vs. State of Maryland, et al,* 4 Wheat. 316, 4 L. Ed. 579, wherein was involved an attempted lexy of a tax by the State of Maryland upon the right of a bank, existing by virtue of an Act of Congress, to engage in business within that state, Chief Justice Marshall, speaking for the court and construing the respective rights and powers of the State and Federal governments, held that the attempted levy was invalid in that it imposed a burden upon a Federal

instrumentality, contrary to the Constitution. It was there said, p. 608:

> "If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states."

Following this case, there have been many decisions by this Court, wherein levies similar to the one involved in this cause, have been held unconstitutional and void.

In *Osborne et al vs. Bank of the United States*, 9 Wheat, 739; 6 L. Ed. 204; *Thompson vs. Union Pacific Ry. Co.*, 9 Wall. 579; *Weston vs. Charleston, etc.*, 2 Peters 466, etc.

In *Union Pacific Ry. Co. vs. Penniston*, 18 Wall. 5, 21 L. Ed. 787, it is said:

> "It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents or upon the mode of their constitution, or upon

> the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. *A tax upon their operations is a direct obstruction to the exercise of federal powers.*" (*Ours.*)

In *Western Union Tel. Co. vs. Seay et al*, 132 U. S. 472, 33 L. Ed. 409, a tax upon gross receipts of a telegraph company attempted to be laid by the State of Alabama was held unconstitutional and void, for the reason that the receipts from interstate business as well as intra-state business were included, and the imposition as to interstate business amounted to a tax on a Federal instrumentality.

This court in *Thomas vs. Gay*, 169 U. S. 264, 42 L. Ed. 740, upholding the levy of a tax by the Territory of Oklahoma upon cattle grazing on an Indian reservation under leases from the Indian tribes, held that while the property, as such, of the lessee from the Indians was a proper subject of taxation by the Territory, yet, if the tax had been upon the business of grazing, or upon the rents received by the Indians, it would have been invalid as an interference

with Federal power. On page 744, it is said:

"It is further contended that this tax law of the Territory of Oklahoma, insofar as it affects the Indian reservations, is in conflict with the constitutional power of Congress to regulate commerce with the Indian tribes. It is said to interfere with, or impose a servitude upon, a lawful commercial intercourse witht he Indians, over which Congress had absolute control, and in the exercise of which control it has enacted the statute authorizing the leasing by the Indians of their unoccupied lands for grazing purposes.

"The unlimited power of Congress to deal with the Indians, their property and commercial relations, so long as they keep up their tribal organizations, may be conceded; but it is not perceived that local taxation, by the state or territory, of property of others than the Indians would be an interference with Congressional power. It was decided in *Utah & Northern Ry. Co. vs. Fisher,* 116 U. S. 28, 29 L. Ed. 542, that the lands and railroad of a railway company within the limits of the Fort Hill Indian reservation, in the Territory of Idaho, was lawfully subject to territorial taxation, which might be enforced within the exterior boundaries of the reservation by proper process. The question was similarly decided in *Maricopa & P. Railroad Co. vs. Arizona Territory,* 156 U. S. 347, L. Ed. 447.

"*The taxes in question here were not imposed on the business of grazing, or on the rents received by the Indians,* but on the cat-

> tle as property of lessees, and, as we have heretofore said that such a tax is too remote and indirect to be deemed a tax or burden on interstate commerce, so is it too remote and indirect to be regarded as an interference with the legislative power of Congress." (*Ours.*)

To the same effect is the decision in the case of *Wagoner et al vs. Evans et al*, 170 U. S. 588, 42 L. Ed. 1154.

In *Noble et al vs. Amoretti*, 71 Pac. 879, the Supreme Court of Wyoming, construing a tax levied by that State on a stock of goods of a licensed Indian trader, located on an Indian reservation in that State, said, at page 882:

> "It was further said by the court (*Thomas vs. Gay, Supra*) that 'the taxes in question were not imposed on the business of grazing or on the rent received by the Indians, but on the cattle, as property of the lessees, and, as we have heretofore said, that as such a tax is too remote and indirect to be deemed a tax or burden on interstate commerce, so is it too remote and indirect to be regarded as an interference with the legislative power of Congress.' This holding of the learned court applied with full force, it seems to us, to the case in hand. The tax upon the stock of goods of the trader is too remote and indirect to be deemed a tax or burden upon commerce with an Indian tribe. Indeed, the contention that the power of Con-

> gress was interfered with in the case of taxation of cattle kept on the reservation by the consent and to the benefit of the Indians, with the approval of Congress, presented a stronger ground for invoking the constitutional provisions as to the exclusive right of Congress to regulate commerce with the Indian tribes than is presented by the facts in the case at bar."

To the same effect is the case of *Montana Catholic Mission vs. Missoula County*, 200 U. S. 118, 50 L. Ed. 398.

The most recent pronouncements of this court to which our attention has been called, bearing upon the question now presented, are those contained in the case of *Williams vs. City of Talladega*, 226 U. S., p. 404, wherein it is said:

> "We therefore have to consider whether a license tax by a State on the doing of business within the state, including the transmission of government messages, by a telegraph company which has accepted the terms of the act of 1866, can be lawfully imposed. By the act of 1866 government messages are given priority over all other business and are transmitted at the rates annually fixed by the Postmaster General; and before the telegraph companies exercise any of the powers or privileges conferred by the law, they are required to file with the Postmaster General their written acceptance of

the restrictions and obligations of the act, (*Revised Stat.*, 5266 and 5268).

"This court has had occasion to consider the effect of this legislation and the acceptance of its terms by the telegraph company so far as the transmission of government telegrams and the transaction of government business is concerned. In the case of *Telegraph Co. vs. Texas*, 105 U. S. 460, an ordinance was held void which required the company to pay a tax of one cent for all full rate messages sent, and one-half cent for every message less than full rate. This was in addition to taxes paid by the company on real and personal property in the state. The ordinance was held void as levying a tax upon interstate messages and also void insofar as it undertook to tax the transaction of government business. After declaring that as to such business companies which had accepted the terms of the act became government agencies, this court, speaking by Mr. Chief Justice Waite, said (p. 464): 'The Western Union Telegraph Co., having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State, or sent by public officers on the business of the

United States.'

"And, after dealing with the interstate commerce feature of the law, said (p. 466):

'As to the government messages, it is a tax by the state on the means employed by the government of the United States to execute its constitutional powers, and herefore, void. It was so decided in *McCulloch vs. Maryland* (4 Wheat. 316), and has never been doubted since.'

"The ordinance sustained in *Postal Telegraph Cable Co. vs. Charleston, supra,* expressly excluded interstate and government messages.

"Were it otherwise, an agency of the Federal Government, in the execution of its sovereign power, would be at the mercy of the taxing power of the State. It is enough in this connection to refer to the cases of *McCulloch vs. Maryland, supra; Osborn vs. Bank,* 9 Wheat, 738; *Railroad Co. vs. Peniston,* 18 Wall. 5; *California vs. Central Pacific R. R. Co.,* 127 U. S. 1; *Central Pacific R. R. Co. vs. California,* 162 U. S. 91.

"We have, then, an ordinance which taxes, without exemption, the privilege of carrying on a business a part of which is that of a governmental agency, constituted under a law of the United States and engaged in an essential part of the public business—communication between the officers and departments of the Federal Government. The ordinance, making no exception of this class of business, necessarily includes its transaction within the privilege tax levied. This part of the license exacted necessarily af-

fects the whole and makes the tax unconstitutional and void. In *Leloup vs. Port of Mobile*, 127 U. S. 640, Mr. Justice Bradley, speaking for the court, said (p. 647):

'It is urged that a portion of the telegraph company's business is internal to the state of Alabama, and therefore taxable by the state. But that fact does not remove the difficulty. The tax affects the whole business without discrimination.' And see *Western Union Co. vs. Alabama Assessment Board*, 132 U. S. 472, 477; *Allen vs. Pullman Car Co.*, 191 U. S. 171, 179.

"For this reason we think the judgment of the Supreme Court of Alabama should be reversed and the case remanded to that court for further proceedings not inconsistent with this opinion."

In *Farmers Bank vs. Minnesota*, 232 U. S. 516, a tax levied on bonds issued by municipalities of Indian Territory, was held void as being a tax on instrumentality of Federal Government.

We insist that the allegations of the bill in view of the authorities herein before cited clearly show; First, that the tax involved in this proceeding is an excise on the right to engage in business of producing coal; Second, that this right is conferred upon the complainant, a corporation existing by virtue of the laws of the Federal Government, by certain agreements between it and the Federal Government,

which constitute complainant an instrument of the government for the performance of a duty, owing, under the terms of the contract, and that therefore the tax is one upon a Federal instrumentality, which, if enforced, will substantially and materially effect and impair the ability of that instrument to perform the governmental purposes evidenced by allegations of said bill, and that therefore, the pretended enactment is unconstitutional and void, and the act of defendant in attempting to enforce said warrant against property of this complainant was without authority of law, and void, and should have been enjoined.

II.

Questions four and five presented to the court fall naturally into the same category, and therefore we shall consider them jointly.

The attention of the court is respectfully directed to the language of the Act of May 26th, 1908, as amended March 27th, 1909, which were to the only attempted enactments of the State Legislature, concerning subject matter of this suit, at the time of the filing of bill of complaint herein. It will be noted that by the original act the tax is termed "a

gross revenue tax'' and is measured by a percentage of gross receipts from the production of coal. By the use of the term ''gross revenue'' or ''gross receipts'' the Legislature has attempted to subject to the excise provided by this enactment all funds enuring to the complainant from the production of coal. There is no exception mentioned in the act, nor in the amendment of 1909, as to any portion of the funds so arising from the mining operations of complainant but so much thereof as is necessary to pay the royalties specified in the lease agreements and acts under which complainant is engaged in the business of mining is subjected in the same manner and to the same extent to the payment of the excise thereby sought to be laid. This is demonstrated by the allegations of the bill from which the court will observe, that for the period from May to November, 1908, complainant was required to make the returns prescribed by the act, showing the total amount of gross receipts from coal produced by it. It is further alleged that pursuant to the terms of pretended enactment of May 26, 1908, the State Auditor had caused to be placed in the hands of the defendant as sheriff of Pittsburgh County certain warrants for the collection of the tax so computed on

the return of gross receipts during the period stated, and it is the execution of these warrants which the bill seeks to enjoin. In the "gross receipts" returned to the State Auditor of necessity were included the amount of royalties subsequently paid to the government under terms of leases and the Curtis Act. The mere fact that some two years subsequently the Legislature of the State of Oklahoma may have seen fit to further amend its scheme of taxation by requiring the State Auditor to exclude from gross receipts derived from the production of coal on segregated Indian lands, the amount of royalties required to be paid to the government before computing the tax could not affect the levy sought to be enjoined in this action. There is no expression either directly or inferentially upon the face of the act of 1910, which shows that it was the intention of the legislature to make it retroactive, and indeed it is submitted that such an act would be unconstitutional and void when viewed in the light of Sec. 53, Art. 5, of the Oklahoma Constitution, which is as follows:

> "The Legislature shall have no power to release or extinguish or to authorize the releasing or extinguishing, in whole or in part, the

indebtedness, liabilities, or obligations of any corporation, or individual, to this State, or any county or other municipal corporation thereof."

It has been too often stated to require citation or authority, that for a State Legislature to give its enactment a retrospective operation the intention to do so must be clearly expressed or necessarily implied from what is expressed. (See *Southwestern Coal & Improvement Co. vs. McBride*, 185 U. S. 499, 46 L. Ed. 1010).

So that, it is insisted that the bill of complaint in this cause clearly shows that the tax sought to be enjoined is laid upon that part of receipts from the production of coal by this complainant, required by law and its contracts to be paid into the Treasury of the United States as a royalty, and thereafter devoted to the education of the children of Indian blood of the Choctaw and Chickasaw nations. This cannot be better demonstrated than by referring to the effect of the decree dismissing the bill of compliant in this cause. The defendant as Sheriff of Pittsburgh County will proceed to levy tax warrants placed in his hads, and make return thereof. There is no authority vested in him by any law of

the State of Oklahoma to change the amount of the warrant, nor is such authority vested in any other official of the State of Oklahoma.

If then, the State of Oklahoma may impress a burden or demand a percentage of the royalty required to be paid into the treasury for the purpose stated, then it may directly burden the exercise by the government of one of its sovereign powers, that is the provision of the education and development of its wards, i. e., children of Indian blood of the Choctaw and Chickasaw Nations. That the imposition of such an excise on the part of the State would be a direct burden upon the accomplishment of legitimate purpose of the Federal Government and not remote, as is held by the lower court, seems so clear to us as to require but the statement of the proposition for its demonstration. That the State is without authority so to do is likewise so well settled by a long series of adjudications that to refer to more than the cases hereinbefore cited would be but to needlessly extend the argument. It is therefore submitted that under the allegations of bill of complaint in this cause the royalties from the operation of the mines by this complainant located on the

segregated Indian lands are subjected to the excise and that thereby an instrument of the government is taxed and that on this account, as well as for the reasons heretofore advanced, the demurrer to bill should have been overruled.

III

Questions numbered VI will next be considered:

Section 19 of Article 10 of the Oklahoma Constitution is as follows:

> "Tax law must specify purpose.—Every act enacted by the Legislature, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose."

The act in itself fails to disclose any purpose for which the tax is levied. Nor is the fund specified into which the proceeds derived from the levy shall be paid. In view thereof, it is contended that the act fails to comply with one of the positive restrictions contained in the State constitution and is therefore void.

In presenting this proposition to this court we

are not losing sight of the well settled doctrine that the construction of the State statutes in the light of State constitutions is primarily for the State courts, and that when a State court of final jurisdiction has announced such a construction of such a statute this court will ordinarily follow the same and in this case we are aware of the decision of the case of *McAlester Edwards Coal Co. vs. Trapp,* decided April 28th, 1914, and reported in 141 Pac. 794, wherein it is said:

> "As to the first ground raised by the plaintiffs, that said law is invalid and contrary to the provisions of the Constitution of Oklahoma, in that it fails to specify the purpose for which said tax is levied, etc., is not well taken. This point has been settled adversely to the contention of the plaintiffs by this court in the cases of *Binion vs. Oklahoma Gas & Elec. Co.,* 28 Okla. 356, 114 Pac. 1096, and *McGannon vs. State,* 33 Okla. 145, 124 Pac. 1063. Hence this point need not be noticed further."

However, by reading the cases of *Binion vs. Okla. Gas & Elec. Co.,* 28 Okla. 356, and *McGannon vs. State,* 33 Okla. 145, it is found that the conclusion expressed in *McAlester-Edwards Coal Co. vs. Trapp, supra,* that the proposition now submitted has been settled by the cases referred to is not sus-

tained by the views of the court expressed in those cases and that the same tends to establish two conclusions respecting the proposition now advanced; First, that the tax prescribed by the act under consideration was an excise or franchise tax and not subject to Sec. 19, Art. 10, which related only to annually recurring property tax, and; Second, if the tax prescribed by the act is a property tax, then the act must comply with the provisions of the quoted section of the constitution, which is held to be mandatory. In the case of *Binion vs. Oklahoma Gas & Elec. Co.*, 28 Okla., 356 at 363, it is said:

> "Conceding that the first act did not meet the requirements of Sec. 19, Art. 10, of the Constitution, it seems to have been permissible to cure the defect by amendment. *State vs. Corbett*, 61 Ark. 226, 32 S. W. 686; *Ferry vs. Campbell*, 110 Iowa, 290, 81 N. W. 604, 50 L. R. A. 92, and note to *Steel County vs. Erskine*, 39 C. C. A. 180. In fact, that does not appear to be seriously controverted by defendant in error.
>
> "In view of the conclusion hereinbefore reached, it is not essential to determine whether the act in question was in violation of Sec. 19, Art. 10, of the Constitution. The Court of Appeals of Kentucky, however, in construing a similar constitutional provision, held that it did not apply to franchise taxes, *Brown-Foreman Co. vs. Com.*, 125 Ky. 402, 101 S. W. 321, 30 Ky. Law Rep. 793. As to whether the rea-

sons that existed in Kentucky by which the Court of Appeals was induced to reach that conclusion would apply or have any persuasive force in this state, we do not now determine."

And in the case of *McGannon vs. State*, 33 Okla. 145:

"Neither is there merit in the contention that as Art. 10, Sec. 19, of the Constitution provides, 'Every act enacted by the Legislature * * * levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose,' and the act under construction provides that the tax when collected 'shall be applied' (1) for the use of the public schools of the state, (2) for the expense of the State Government, and (3) for any other purpose which the Legislature may by law direct'—that said act is in conflict with said section of the Constitution, and that it does not specify distinctly the purpose for which the tax is levied. This, for the reason that said section of the Constitution is intended to apply only to annually recurring taxes imposed generally upon the entire property of the state, and not the kind of tax we are dealing with, which is a special tax. In *Brown Etc. Co. vs. Commonwealth*, 125 Ky. 402, 101, S. W. 321, the court had under construction a similar constitutional provision. In that case the commissioners in the revision of the laws relating to taxation understood the section (Constitution effective in 1891, Sec. 180) as not to refer to taxes of this kind, and

for years thereafter the Legislature in subsequent acts passed, impliedly adopted the construction of the commissioners. This led the court to adopt that construction in that case, and that too, apparently, withou further au and that too, apparently, without further authority in support thereof. In *Re McPherson*, the court held: '*Const. N. Y.* Art. 3, Sec. 20, providing that every law which imposes, continues, or revives a tax shall distinctly state the tax, and the object to which it is to be applied, does not apply to Laws N. A. 1885, C. 483, imposing a succession tax upon legacies to persons not related to the testator; but applies only to annually recurring taxes, and taxes imposed generally upon *the* entire property of the state, and not to special taxes upon special or limited kinds of property.''

''And indeed in construing the act of May 26th, 1908, entitled: 'An Act to provide for held by lease or rental contract in excess of 640 acres of average taxable land, and a graduated tax upon incomes, rents and profits of lands, held by lease or rental contract in excess of 640 acres, was vaid because in conflict of Sec. 9, Art. 10, in that it failed to specify purpose for which tax was levied.' ''

''Is the act in conflict with Sec. 19, Art. 10, of the Constitution (*Williams Ann. Const.* 284)? That section is as follows: 'Every act enacted by the Legislature, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied

and collected for one purpose shall ever be devoted to another.'

"The act under consideration does not specify distinctly, or otherwise, the purpose for which the tax is levied. The only language in the act which is referred to as approximately so stating, is that portion of Sec. 2, reading as follows:

'All persons owning land in this state of taxable value equivalent to six hundred and forty acres of average taxable value, or less, shall pay the same ad valorem tax rate as is levied and charged for all purposes of government against personal or other property in this state' * * *

"It is argued that, pursuant to this language, the graduated tax is levied' for all purposes of government,' but it is manifest from reading the language that the phrase, 'for all purposes of government' does not specify the purpose for which the graduated tax is levied, but is merely descriptive of the rate charged against personal or other property. This section of the Constitution is mandatory, and the failure of the act to specify the purpose for which the tax is levied is fatal. *Commonwealth vs. U. S. F. & G. Co.*, 121 Ky. 409, 89 S. W. 251; *C. O. & S. W. R. C. vs. Commonwealth*, 33 Ky. L. Rep. 882, 111 S. W. 334; *Southern Ry. Co. vs. Hamblen County*, 115 Tenn. 526, 92 S. W. 238."

"We are not concerned with the policy or the wisdom of this constitutional requirement. It is sufficient for us that the Constitution so declares. It is apparent, however, that as taxes are paid by the people, they have required the

Legislature, as well as other political subdivisions, in levying a tax which they are to pay, to inform them by the act of the purpose for which they are to pay the tax, and in the absence of this information they have a right to refuse payment. The people who are called upon to pay this tax have no idea why they are thus taxed. They have no idea for what purpose the tax they pay will be applied, and by their Constitution they have reserved the right to refuse to pay a tax, unless they are informed of its purpose."

"But it is argued that under the decision of this court, in *McGannon vs. State*, 33 Okla., 145, 124 Pac. 1063, it is unnecessary for an act levying a tax of this nature to specify the purpose for which it is levied. The McGannon case does not so hold. That case involved the inheritance tax. An inheritance tax is only levied once, and the court held that this section of the Constitution did not apply for that reason, but applied only to annually recurring taxes. The tax in the case at bar is an annual tax, and therefore does not come within the reason or the language of the McGannon case."

It is therefore asserted that the question whether or not the act under consideration is annulled by this section of the Oklahoma Constitution, for failure to specify the purpose for which the tax was levied, has never been settled and is open, and that under the cases cited as having been decided by the Supreme Court of Oklahoma, the act fails to com-

ply with the mandates of the State Constitution and therefore is void.

It is submitted that the bill of complaint in this cause contains allegations amply showing that com plainant was entitled to the relief asked for, and that the court erred in sustaining the demurrer thereto, and dismissing the bill, for which error this cause should be reversed.

Respectfully submitted,

M. L. BELL,

C. O. BLAKE,

J. G. GAMBLE,

Attorneys for Complainant.

Appendix "A"

GROSS REVENUE TAX.

House Bill No. 443.

AN ACT to amend section six, of the Session Laws of 1907 and 1908, the same bein entitled an act providing for the levy and collection of a gross revenue tax from public service corporations in this state and from persons, firms, corporations or associations engaged in the mining or production of coal, asphalt or ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other mineral oil or of natural gas; said section six of the Session Laws being section 6135 of the General Statutes of the State of Oklahoma, 1908.

Be it Enacted by the People of the State of Oklahoma:

Section 1. That Sec. 6, Art. 2, Chap. 71, of the Session Laws of 1907-08 be and the same is hereby amended to read as follows, to-wit: Every person, firm, association, or corporation engaged in the mining, or production, within this state, of coal or asphalt or of ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other mineral oil or of natural gas, shall within thirty days after the expiration of each quarter annual period expiring respectively on the last day of June, September, December and March of each year, file with the

State Auditor a statement under oath, on forms prescribed by him, showing the location of each mine, or oil or gas well operated by such person, firm, association or corporation during the last preceding quarter annual period, the kind of mineral, oil or gas; the gross amount thereof produced; the actual cash value thereof and such other information pertaining thereto as the State Auditor may require, and shall at the same time, pay to the State Treasurer a gross revenue tax, which shall be in addition to the taxes levied, and collected upon an ad valorem basis upon such mining, oil or gas property and the appurtenances thereunto belonging, equal to one half of one per centum of the gross receipts from the total production of coal therefrom; one-half of one per centum of the gross receipts from the total production of ores bearing lead, zinc, jack, gold, silver or copper or asphalt; one-half of one percentum of the gross receipts from the total production of petroleum, or other mineral oil, or of natural gas; Provided, however, that the State Auditor shall have power to require any such person, firm, association or corporation engaged in mining or the production of minerals, to furnish any additional information by him deemed to be necessary for the purpose of computing the amount of said tax, and to examine the books, records and files of such person, firm, association or corporation; and shall have power to examine witnesses, and if any witness shall fail or refuse to appear at the summons or request of the State Auditor, said State Auditor shall certify the facts and the name of the witness so failing and refusing to appear to the district

court of this state having jurisdiction of the party, and said court shall thereupon issue a summons to the said party to appear and give such evidence as may be required, and upon a failure so to do the offending party shall be punished as provided by law in cases of contempt. For the purpose of ascertaining whether or not any return so made is the true and correct return of the gross receipts of any such person, firm, association or corporation, engaged in mining or the production of minerals, and whenever it shall appear to the State Auditor that any such person, firm, association or corporation engaged in mining or the production of minerals, has unlawfully made an untrue or incorrect return of its gross receipts, as hereinbefore required, he shall ascertain the correct amount of such gross receipts and shall compute said tax.

Section 2. All funds arising under the provisions of article II, Chapter 71, of the Session Laws of 1907-08 shall be paid into the State Treasury and shall be credited to the general revenue fund of the state for the payment of the expenses of the state government.

Sec. 3. All acts and parts of acts in conflict herewith are hereby repealed.

Sec. 4. For the preservation of the public peace and safety an emergency is hereby declared to exist, by reason whereof this act shall be in force and take effect from and after its passage and approval.

Approved March 27th, 1909.

Exhibit "A"

Chapter 71.

REVENUE—GROSS REVENUE TAX.

Article II.

AN ACT

PROVIDING FOR THE LEVY AND COLLECTION OF A GROSS REVENUE TAX FROM PUBLIC SERVICE CORPORATIONS IN THIS STATE AND FROM PERSONS, FIRMS, CORPORATIONS OR ASSOCIATIONS ENGAGED IN THE MINING OR PRODUCTION OF COAL, ASPHALT OR ORES BEARING LEAD, ZINC, JACK, GOLD, SILVER OR COPPER, OR OF PETROLEUM OR OTHER MINERAL OIL OR OF NATURAL GAS; AND DECLARING AN EMERGENCY.

Be it Enacted by the People of the State of Oklahoma:

Section 1. As used in this Act the term "transportation company" shall include any company, corporation, trustee, receiver, or any other person owning, leasing, or operating for hire a railroad and also any freight car company, car corporation, or company, trustee, or person in any way engaged in such business as a common carrier. The term "transportation company" shall include any company, corporation, trustee, receiver or other person owning,

leasing, or operating for hire any telegraph or telegraph or telephone line.

The term "public service corporation" as used in this Act shall include all transportation and transmission companies, all gas, electric light, heat and power companies, and all water works companies, and all persons authorized to exercise the right of eminent domain or to use or occupy any right of way, street, alley, or public highway, whether along, over, or under the same in manner not permitted to the general public.

The term "person" as used in this article shall include individuals, partnerships, associations and corporations in the singular as well as the plural number.

Sec. 2. Every corporation hereinafter named shall pay the state a gross revenue tax for the fiscal year ending June thirtieth, nineteen hundred nine, and for each fiscal year thereafter, which shall be in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets of such corporation equal to the per centum and its gross receipts hereinafter provided, if such public service corporation operates wholly within the state; and if such public service corporation operates partly within and partly without the state it shall pay tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the the state bears to the whole of its business; provided, that if satisfactory evidence is submitted to the corporation commission, at any time prior to the time fixed by this

Act for the payment of said tax, that any other proportion more fairly represents the proportion which the gross receipts of any such public service corporation for any year within this state bears to its total gross receipts, it shall be the duty of said corporation commission to fix, by an order entered of record, such other proportion of its total gross receipts as the proportion upon which said tax shall be computed; and a copy of such order so made and entered of record, as aforesaid, shall be certified to the state auditor.

Sec. 3. Such gross revenue tax so required to be paid shall be equal to the percentage of the gross receipts of each public service corporation as follows:

Railroads, one-half of one per centum; sleeping car companies, stock car companies, refrigerator car companies, and other private car associations, car trusts and car companies, any person, firm, association, company, or corporation engaged in the express business, three per centum; pipe lines, two per centum; telephone companies one-half of one per centum; telegraph companies two per centum; electric light and gas, heat and power companies, one-half of one per centum; water works companies, one-fourth of one per centum. For the purpose of determining the amount of such tax, the managing officers or agents of each such public service corporations shall, on or before the first day of October, nineteen hundred, eight, and annually thereafter, report to the state auditor under oath, the gross receipts of such public service corporation, from every source what-

soever for the fiscal year ending the thirtieth day of June, and shall immediately pay to the state treasurer the gross revenue tax herein imposed, calculated as hereinbefore provided; provided, however, that the state auditor shall have power to require such public service corporaiton to furnish any additional information by him deemed to be necessary for the purpose of computing the amount of said tax, and to examine the books, records, and files of such corporation; and shall have power to examine witnesses and if any witness shall fail or refuse to appear at the summons or request of the state auditor, said state auditor shall verify the facts and the name of the witness so failing and refusing to appear, to the district court, of this state, having jurisdiction of the party, and said court shall thereupon issue a summons to the said party to appear and give such evidence as may be required and upon a failure so to do the offending party shall be punished as provided by law in cases of contempt. And whenever it shall appear to the state auditor that any public service corporation has wilfully made an untrue or incorrect return of its gross receipts as hereinbefore required, he shall ascertain the correct amount of such gross receipts and shall compute said tax.

Sec. 4. Whenever any public service corporation in this state shall fail to file the report of its gross receipts within the time provided for in this Act, the state auditor shall forthwith cause an examination to be made into the books and records of such corporation and shall ascertain the amount of its gross receipts in accordance with the provisions of this Act, and

shall compute such gross revenue tax, and shall at the same time tax against said delinquent corporation all costs and expenses incurred on making such examination.

Sec. 5. The tax provided for in section three of this Act shall become delinquent after the first day of October of the fiscal year for which it is levied and shall, as a penalty for such delinquency, bear interest from said date at the rate of eighteen per centum per annum.

Sec. 6. Every person, firm, association, or corporation engaged in the mining, or production, within this state, of coal or asphalt, or of ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other mineral oil or of natural gas, shall, within thirty days after the expiration of each quarter annual period expiring respectively on the first day of July, October, January and April of each year, file with the state auditor a statement under oath, on forms prescribed by him, showing the location of each mine, or oil, or gas well, operated by such person, firm, association, or corporation during the last preceding quarter annual period, the kind of mineral, oil, or gas; the gross amount thereof produced; the actual cash value thereof; and such other information pertaining thereto as the state auditor may require, and shall at the same time pay to the state treasurer a gross revenue tax, which shall be in addition to the taxes levied, and collected upon an ad valorem basis upon such mining, oil, or gas property and the appurtenances thereunto belonging, equal to two per centum of the gross receipts from the total production of ores bear-

ing lead, zinc, jack, gold, silver, or copper, or of asphalt; one-half of one per centum of the gross receipts from the total production of petroleum, or other mineral oil, or of natural gas; Provided, however, that the state auditor shall have power to require any such person, firm, association, or corporation, engaged in mining or the production of minerals, to furnish any additional information by him deemed to be necessary for the purpose of computing the amount of said tax, and to examine the books, records and files of such person, firm, association, or corporation; and shall have power to examine witnesses, and if any witness shall fail or refuse to appear at the summons or request of the state auditor said state auditor shall certify the facts and the names of the witness so failing and refusing to appear, to the district court, of this state having jurisdiction of the party and said court shall thereupon issue a summons to the said party to appear and give such evidence as may be required and upon a failure so to do the offending party shall be punished as provided by law in cases of contempt. For the purpose of ascertaining whether or not any return so made is the true and correct return of the gross receipts of any such person, firm, association, or corporation, engaged in mining or the production of mineral, and whenever it shall appear to the state auditor that any such person, firm, association or corporation engaged in mining or the production of minerals, has wilfully made an untrue or incorrect return of its gross receipts as hereinbefore required, he shall ascertain the correct amount of such gross receipts and shall compute said tax.

Sec. 7. The tax provided for in the preceding section shall become delinquent after the date fixed for each quarter-annual report to be filed in the office of the state auditor and from such time it shall as a penalty for such delinquency, bear interest at the rate of eighteen per centum per annum and shall be collected in the manner hereinafter provided. If any person, firm, association, or corporation shall fail to make the report of the gross production of any mine or oil or gas well, upon which tax herein provided for within the time prescribed by law for such report, it shall be the duty of the state auditor to examine the books, records and files of such person, firm, association or corporation to ascertain the amount and value of such production to compute the tax thereon as provided herein and shall add thereto the cost of such examination together with any penalties accrued thereon.

Sec. 7a. When satisfactory evidence under oath is produced to the state auditor that any person, firm, association, or corporation engaged in mining or producing within this state asphalt, lead, zinc, jack, gold, silver, copper or petroleum or other mineral oil, have in this state manufactured or refined any portion of such products in this state and thereafter on the finished product have paid ad valorem taxes, the state auditor is hereby authorized to rebate and pay to such person, firm, association or corporation the just proportion of taxes paid by said person, firm, association or corporation, on his or its crude product under section six of this Act, which shall have been found to have been turned into finished product

as aforesaid, and cause such sum ,if any, so rebated, to be repaid by warrant drawn on the state treasurer.

Sec. 8. When any tax provided for in this Act shall become delinquent the state auditor shall issue his warrant directed to the sheriff of any county wherein the same, or any part thereof, accrued, and the sheriff to whom said warrant shall be directed shall proceed to levy upon the property, assets, and effects, of the person, firm, association, or corporation against whom said tax is assessed and to sell the same and to make return thereof as upon execution.

Sec. 9. Any person who shall make any false oath to any report required by the provision of this Act shall be deemed guilty of perjury.

Sec. 10. An emergency is hereby declared by reason it is necessary for the immediate preservation of the public peace, health and safety that this Act take effect from and after its passage and approval.

Approved May 26th, 1908.

TAXATION—GROSS REVENUE TAX.

House Bill No. 76.

AN ACT providing for the levy and collection of a gross revenue tax from public service corporations in this state and from persons, firms, corporations or associations engaged in the mining or production of coal, asphalt or ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other mineral

oil or of natural gas; and declaring an emergency.

Be it Enacted by the People of the State of Oklahoma.

Definition of terms used.

Section 1. As used in this act, the term "Transportation Company" shall exclude railroad companies operating steam railroads in this state, but shall include any freight car company, car corporations or company, trustee, or person engaged in the business of renting, leasing or hiring private cars for the transportation of persons or property and shall include any person, firm, association, company or corporation engaged in the express business.

The term "Transmission Company" shall include any company, corporation, trustee, receiver, or other person, owning, leasing or operating for hire, any telegraph or telephone line or any other instrumentality or means for transmitting messages and communications for hire.

The term "Public Service Corporation Companies," as used in this Act, shall include all transportation and transmission companies, all gas, electric light, heat and power companies, all water works companies, and all persons, firms, corporations or associations authorized to exercise the right of eminent domain or to use or occupy any right of way, street, alley or public highway, whether along, over or under the same, in a manner not permitted to the general public.

The term "person" as used in this act, shall

include individuals, partnerships, associations and corporations in the singular as well as in the plural number.

Basis for computation of tax.

Section 2. Every corporation hereinafter named shall pay the state a gross revenue tax for the fiscal year ending June thirtieth, nineteen hundred and nine, and for each fiscal year, thereafter, which shall be in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets of such corporation equal to the per centum of its gross receipts hereinafter provided, if such public service corporation operate wholly within the state, and if such public service corporation operates partly within and partly without the state, it shall pay a tax equal to such proportion of said per centum of its pross receipts as the portion of its business done within the state bears to the whole of its business; provided that if satisfactory evidence is submitted to the Corporation Commission, at any time prior to the time fixed by this act for the payment of said tax, that any other proportion more fairly represents the proportion which the gross receipts of any such public service corporation for any year within this state bears to its total gross receipts, it shall be the duty of said Corporation Commission to fix, by an order entered of record, such other proportion of its total gross receipts as the proportion upon which said tax shall be computed; and a copy of such order as made and entered of record, as aforesaid shall be certified to the State Auditor.

Public service corporation—tax rates—ascertainment of gross receipts.

Section 3. Such gross revenue tax so required to be paid shall be equal to the percentage of the gross receipts of each public service corporation as follows: Sleeping car companies, stock car companies, refrigerator car companies and other private car associations, car trust and car companies, any person, firm, association, company or corporation engaged in the express business, three per centum; pipe lines, two per centum; telephone companies, one-half of one per centum; telegraph companies two per centum; electric light and gas, heat and power companies, one-half of one per centum; water works companies, one-fourth of one per centum. For the purpose of determining the amount of such tax, the managing officers or agents of each of such public service corporation shall, on or before the first day of October, nineteen hundred eight and annually thereafter, report to the State Auditor under oath, the gross receipts of such public service corporation, from every source whatsoever, for the fiscal year ending the thirtieth day of June, and shall immediately pay to the State Treasurer the gross revenue tax herein imposed, calculated as hereinbefore provided; provided, however, that the State Auditor shall have power to require such public service Corporation to furnish any additional information by him deemed to be necessary for the purpose of computing the amount of said tax, and to examine the books, records, and files of such corporation; and shall have power to examine witnesses and if any witness shall fail or refuse to ap-

pear at the summons or request of the State Auditor, said State Auditor shall certify the facts and the name of the witness so failing and refusing to appear, to the district court, of this state, having jurisdiction of the party, and said court shall thereupon issue a summons to the said party to appear and give such evidence as may be required and upon a failure so to do the offending party shall be punished as provided by law in cases of contempt and whenever it shall appear to the State Auditor that any public service corporation has wilfully made an untrue or incorrect return of its gross receipts as hereinbefore required, he shall ascertain the correct amount of such gross receipts and shall compute said tax.

Failure to report receipts—duties of auditor.

Section 4. Whenever any public service corporation in this state shall fail to file the report of its gross receipts within the time provided for in this act, the State Auditor shall forthwith cause an examination to be made into the books and records of such corporation, and shall ascertain the amount of its gross receipts in accordance with the provisions of this act, and shall compute such gross revenue tax, and shall at the same time tax against said delinquent corporation all costs and expenses incurred on making such examination.

Delinquent tax—penalty.

Section 5. The tax provided for in section three of this act shall become delinquent after the first day of October of the fiscal year for which it is levied and shall, as a penalty for

such delinquency, bear interest from said date at the rate of eighteen per centum per annum.

Mining companies—tax rate—ascertainment of production.

Section 6. Every person, firm, association, or corporation engaged in the mining, or production, within this state, of coal or asphalt, or of ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other mineral oil or of natural gas, shall, within thirty days after the expiration of each quarter annual period, expiring respectively on the last day of June, September, December, and March of each year, file with the State Auditor a statement under oath, on forms prescribed by him, showing the location of each mine or oil or gas well, operated by such person, firm, association, or corporation, during the last preceding quarter annual period, the kind of mineral, oil or gas; the gross amount thereof produced; the actual cash value thereof and such other information pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Treasurer a gross revenue tax, which shall be in addition to the taxes levied and collected upon an ad valorem basis upon such mining, oil or gas property and the appurtenances thereunto belonging, equal to one-half of one per centum of the gross receipts from the total production of coal therefrom; one-half of one per centum of the gross receipts from the total production of ores, bearing lead, zinc, jack, gold, silver, or copper or asphalt; one-half of one per centum of the gross receipts from the total production of petroleum, or other mineral

oil, or of natural gas; Provided, however, that the State Auditor shall have power to require any such person, firm, association or corporation engaged in mining or the production of minerals, to furnish any additional information by him deemed to be necessary for the purpose of computing the amount of said tax, and to examine the books, records and files of such person, firm, association or corporation; and shall have power to examine witnesses and if any witness shall fail or refuse to appear at the summons or request of the State Auditor, said State Auditor shall certify the facts and the name of the witness so failing and refusing to appear to the District Court of this state having jurisdiction of the party, and said court shall thereupon issue a summons to the said party to appear and give such evidence as may be required, and upon a failure so to do the offending party shall be punished as provided by law in cases of contempt. For the purpose of ascertaining whether or not any return so made is the true and correct return of the gross receipts of any such person, firm, association or corporation, engaged in mining or the production of minerals, and whenever it shall appear to the State Auditor that any such person, firm, association or corporation engaged in mining or the production of minerals, has unlawfully made an untrue or incorrect return of its gross receipts, as hereinbefore required, he shall ascertain the correct amount of such gross receipts and shall compute said tax. Provided, that any such person, firm, association or corporation shall at the time of making its report to the State Auditor, set out specifically the amount of royalty required to be paid for the

benefit of the Indian citizen, Indian tribe or landlord and in computing said tax shall pay on the actual cash value of the entire gross production less the royalty paid by such person, firm or corporation.

Delinquency of mining company—penalties.

Section 7. The tax provided for in the preceding section shall become delinquent after the date fixed for each quarter-annual report to be filed in the office of the State Auditor and from such time shall, as a penalty for such delinquency, bear interest at the rate of eighteen per centum per annum and shall be collected in the manner hereinafter provided. If any person, firm, association, or corporation shall fail to make the report of the gross production of any mine or oil or gas well, upon which tax herein provided for within the time prescribed by law for such report it shall be the duty of the State Auditor to examine the books, records and files of such person, firm, association or corporation to ascertain the amount and value of such production to compute the tax thereon as provided herein, and shall add thereto the cost of such examination, together with any penalties accrued thereon.

Rebate of tax on crude products refined.

Section 8. When satisfactory evidence under oath is produced to the State Auditor that any person, firm, association, or corporation engaged in mining or producing within this state asphalt, lead, zinc, jack, gold, silver, copper, or petroleum or other mineral oil have in this state manufactured or refined any potrion of such products in this state and thereafter on

the finished products have paid ad valorem taxes, the State Auditor is hereby authorized to rebate and pay to such person, firm, association or corporation the just proportion of taxes paid by said person, firm, association or corporation, on his or its crude productions under section six of this act, which shall have been found to have been turned into finished product as aforesaid, and cause such sum, if any, so rebated, to be repaid by warrant drawn on the State Treasurer.

Collection of delinquent tax.

Section 9. When any tax provided for in this act shall become delinquent the State Auditor shall issue his warrant directed to the sheriff of any county wherein the same, or any part thereof accrued, and the sheriff to whom said warrant shall be directed shall proceed to levy upon the property, assets, and effects of the person, firm, association or corporation against whom said tax is assessed and to sell the same and to make return thereof as upon execution.

False reports—perjury.

Section 10. Any person who shall make any false oath to any report required by the provision of this act shall be deemed guilty of perjury.

Disposition of taxes.

Section 11. All taxes levied and collected under the provisions of this act shall be paid into the State Treasury and applied to the payment of the ordinary expenses of the state government.

Approved March 10th, 1910.

ARTICLE X OF THE CONSTITUTION OF OKLAHOMA

Revenue and Taxation.

Section 1. The fiscal year shall commence on the first week day of July in each year unless otherwise provided by law.

Section 2. The Legislature shall provide by law for an annual tax sufficient, with other resources, to defray the estimated ordinary expenses of the State for each fiscal year.

Section 3. Whenever the expense of any fiscal year shall exceed the income, the Legislature may provide for levying a tax for the ensuing fiscal year, which with other resources, shall be sufficient to pay the deficiency, as well as the estimated ordinary expenses of the state for the coming year.

Section 4. For the purpose of paying the state debt, if any, the Legislature shall provide for levying a tax, annually sufficient to pay the annual interest and principal of such debt within twenty-five years from the final passage of the law creating the debt.

Section 5. The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects.

Section 6. All property used for free public libraries, free museums, public cemeteries, property used exclusively for schools, colleges, and all property used exclusively for religious and charitable purposes, and all property of the United States, and of this state; and of counties and municipalities of this State; household goods of the heads of fam-

ilies, tools, implements, and live stock employed in the support of the family, not exceeding one hundred dollars in value, and all growing crops, shall be exempt from taxation; Provided, That all property not herein specified now exempt from taxation under the laws of the Territory of Oklahoma, shall be exempt from taxation until otherwise provided by law; and Provided Further, That there shall be exempt from taxation to all ex-Union and ex-Confederate soldiers, bona fide residents of this State, and to all widows of ex-Union and ex-Confederate soldiers, who are heads of families and bona fide residents of this State, personal property not exceeding two hundred dollars in value.

Exemptions: All property owned by the Murrow Indian Orphan Home, located in Coal County, and all property owned by the Whittaker Orphan Home, located in Mays County, so long as the same shall be used exclusively as free homes or schools for orphan children, and for poor and indigent persons, and all fraternal orphan homes and other orphan homes together with all their charitable funds, shall be exempt from taxation, and such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by Federal laws, during the force and effect of such treaties or Federal laws.

Exemptions: The Legislature may authorize any incorporated city or town, by a majority vote of its electors, voting thereon, to exempt manufacturing establishments and public utilities from municipal taxation, for a period not exceeding five pears as an inducement to their location.

Section 7. The Legislature may authorize county and municipal corporations to levy and col-

lect assessments for local improvements upon property benefitted thereby, homesteads included without regard to a cash valuation.

Section 8. All property which may be taxed ad valorem shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale, and any officers or other person authorized to assess values, or subjects, for taxation, who shall commit any wilfull error in the performance of his duty, shall be deemed guilty of malfeasance, and upon conviction thereof shall forfeit his office, nd be otherwise punished as may be provided by law..

Section 9. Except as herein otherwise provided, the total taxes, on ad valorem basis, for all purposes, State, county, township, city or town, and school district taxes, shall not exceed in any one year thirty-one and one-half mills on the dollar, to be divided as follows:

State Levy: Additional for Schools.—State levy, not more than three and one-half mills; county levy not exceeding two mills additional for county high school and aid to the common schools of the county, not over one mill of which shall be for such high school, and the aid to said common schools apportioned as provided by law; township levy, not more than five mills; city or town levy, not more than ten mills; school district levy, not more than five mills on the dollar for school district purposes, for support of common schools: Provided, That the aforesaid annual rate for school purposes may be increased by any school district by an amount not to exceed ten mills on the dollar valuation, on condition that a majority of the voters thereof voting at an election, vote for said increase.

Section 10. For the purpose of erecting public buildings in counties, cities, or school districts, the rates of taxation herein limited, may be increased, when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and a majority of the qualified voters, of such county, city, or school district, voting at such election, shall vote therefor: Provided, That such increase shall not exceed five mills on the dollar of the assessed value of the taxable property in such county, city, or school district.

Section 11. The receiving, directly or indirectly, by any officer of the State, or of any county, city, or town, or member or officer of the Legislature, of any interest, profit, or perquisites, arising from the use or loan of public funds in his hands or moneys to be raised through his agency for State, city, town, district, or county purposes shall be deemed a felony. Said offense shall be punished as may be prescribed by law, a part of which punishment shall be disqualification to hold office.

Section 12. The Legislature shall have power to provide for the levy and collection of license, franchise, gross revenue, excise, income, collateral and direct inheritance, legacy, and succession taxes; also graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes; also stamp, registration, production or other specific taxes.

Section 13. The State may select its subjects of taxation, and levy and collect its revenues independent of the counties, cities, or other municipal subdivisions.

Section 14. Taxes shall be levied and collected by general laws, and for public purposes only, ex-

cept that taxes may be levied when necessary to carry into effect Section thirty-one of the Bill of Rights. Except as required by the Enabling Act, the State shall not assume the debt of any county, municipal corporation, or political subdivision of the State, unless such debt shall have been contracted to defend itself in time of war, to repel invasion, or to suppress insurrection.

Section 15. The credit of the State shall not be given, pledged, or loaned to any individual, company, corporation, or association, municipality, or political subdivision of the State; nor shall the State become an owner or stockholder in, nor make donation by gift, subscription to stock, by tax or otherwise, to any company, association, or corporation,

Section 16. All laws authorizing the borrowing of money by and on behalf of the State, county, or other political subdivision of the State, shall specify the purpose for which the money is to be used, and the money so borrowed shall be used for no other purpose.

Section 17. The Legislature shall not authorize any county or subdivision thereof, city, town, or incorporated district, to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or levy any tax for, or to loan its credit to any corporation, association, or individual.

Section 18. The Legislature may authorize the levy and collection of a poll tax on all electors of this State, under sixty years of age, not exceeding two dollars per capita, per annum, and may provide a penalty for the non-payment thereof.

Section 19. Every act enacted by the Legisla-

ture, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose.

Section 20. The Legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes.

Section 21. There shall be a State Board of Equalization consisting of the Governor, State Auditor, State Treasurer, Secretary of State, Attorney General, State Inspector and Examiner, and President of the Board of Agriculture. The duty of said Board shall be to adjust and equalize the valuation of real and personal property of the several counties in the State, and it shall perform such other duties as may be prescribed by law, and they shall assess all railroad and public service corporation property.

Section 22. Nothing in this Constitution shall be held or construed, to prevent the classification of property for purposes of taxation; and the valuation of different classes by different means or methods.

PUBLIC INDEBTEDNESS.

Section 23. The State may, to meet casual deficits or failure in revenues, or for expenses not provided for, contract debts; but such debts, direct and contingent, singly or in the aggregate, shall not, at any time, exceed four hundred thousand dollars,

and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained or to repay the debts so contracted, and to no other purpose whatever.

Section 24. In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection or to defend the State in war; but the money arising from the contracting of such debts shall be applied to the purposes for which it was raised, or to repay such debts, and to no other purpose whatever.

Section 25. Except the debts specified in sections twenty-three and twenty-four of this article, no debts shall hereafter be contracted by or on behalf of this State, unless such debt shall be authorized by law for some work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due and also to pay and discharge the principal of such debt within twenty-five years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election. On the final passage of such bill in either House of the Legislature, the question shall be taken by yeas and nays, to be duly entered on the journals thereof, and shall be: "Shall this bill pass, and ought the same to receive the sanction of the people?"

Section 26. No county, city, town, township, school district, or other political corporation, or subdivision of the State, shall be allowed to become indebted, in any manner, for any purpose, to an

amount exceeding in any year, the income and revenue provided for such year without the assent of three-fifths of the voters thereof, voting at an election, to be held for that purpose, nor in cases requiring such assent, shall any indebtedness, be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum of the valuation of the taxable property therein, to be ascertained from the last assessment for State and county purposes previous to the incurring of such indebtedness; Provided, That any county, city, town, township, school district, or other political corporation, or subdivision, of the State, incurring any indebted- or subdivision of the State, incurring any indebtedness, requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five years from the time of contracting the same.

Section 27. Any incorporated city or town in this State may, by a majority of the qualified property tax paying voters of such city or town, voting at an election to be held for that purpose, be allowed to become indebted in a larger amount than that specified in section twenty-six, for the purpose of purchasing or constructing public utilities, or for repairing the same, to be owned exclusively by such city; Provided, That any such city or town incurring any such indebtedness requiring the assent of the voters aforesaid, shall have the power to provide for, and, before or at the time of incurring such indebtedness, shall provide for the collection of an annual tax in addition to the other taxes provided

for by this Constitution, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal hereof within twenty-five years from the time of contracting the same.

Section 28. Counties, townships, school districts, cities, and towns shall levy sufficient additional revenue to create a sinking fund to be used, first, for the payment of interest coupons as they fall due; second, for the payment of bonds as they fall due; third, for the payment of such parts of judgments as such municipality may, by law, be required to pay.

Section 29. No bond or evidence of indebtedness of this State shall be valid unless the same shall have endorsed thereon a certificate, signed by the Auditor and Attorney General of the State, showing that the bond or evidence of debt is issued pursuant to law and is within the debt limit. No bond or evidence of debt of any county, or bond of any township or any other political subdivision of any county, shall be valid unless the same have endorsed thereon a certificate signed by the County Clerk, or other officers authorized by law to sign such certificate, and the County Attorney of the county, stating that said bond, or evidence of debt, is issued pursuant to law, and that said issue is within the debt limit.

Section 30. The Legislature shall require all money collected by taxation, or by fees, fines, and public charges of every kind, to be accounted for by a system of accounting that shall be uniform for each class of accounts, State and local, which shall be prescribed and audited by authority of the State.

12

SUPREME COURT

OF THE

UNITED STATES

October Term, 1914.

The Choctaw, Oklahoma & Gulf Railroad Company,
Appellant,

vs.

John A. Harrison, as Sheriff of Pittsburg County, State of Oklahoma, and personally,
Appellee.

No. ~~320~~ 45.

BRIEF OF APPELLEE.

Appealed from Circuit Court of U. S. for Eastern District of Oklahoma.

CHAS. WEST,
Attorney General of Oklahoma.

SUPREME COURT

OF THE

UNITED STATES

October Term, 1914.

The Choctaw, Oklahoma & Gulf Railroad Company,
Appellant,

vs.

John A. Harrison, as Sheriff of Pittsburg County, State of Oklahoma, and personally,
Appellee.

No. 320

BRIEF OF APPELLEE.

Appealed from Circuit Court of U. S. for Eastern District of Oklahoma.

This case is pending before the court on bill and general demurrer.

FACTS.

The facts forming the issue are simple and can be stated briefly. The plaintiff is a corporation. It holds leases for the mining of coal on certain lands belonging to the Choctaw and Chickasaw Indians. The Indians receive a royalty. To some extent, at least, these Indians are wards of the Government. An Act of the Legislature of Oklahoma was approved and became a law imposing a tax upon the gross receipts from the production of coal by mining.

QUESTION.

Under these facts the real question is whether the imposition of this tax interferes with a Federal instrumentality.

ARGUMENT.

At the outset we desire to eliminate one thing, perhaps unintentionally emphasized, and that is that plaintiff was a Federal corporation.

FACT THAT APPELLANT, A FEDERAL CORPORATION IMMATERIAL.

This fact can have no bearing upon the case. The trial court was clearly correct when it said:

> "Nor is the Choctaw, Oklahoma & Gulf Railroad Company, although a federal corporation, any more a federal agency in the operation of the mines upon these Indian lands than any other corporation or individual lessee. *Railroad Company* v. *Penniston*, 18 Wall. 5."

So then we approach the question in the same light as if the leases involved were held by private individuals.

Wells-Fargo case passed on taxes on receipts from transportation, part of which was interstate.

Another observation: On pages 24 and 25 of the brief of appellant they cite *Meyer, Auditor,* v. *Wells Fargo,* 223 U. S. 298, and *M. K. & T.* v. *Meyer, Auditor,* 204 Fed. 140, and then they say:

> "So then we approach the subject of the nature of the tax, and the effect of its imposition upon the properties of the complainant of this cause in the light of these adjudicated cases."

The point which counsel lay great stress upon is that the tax sought to be imposed is not a property tax and they tie their faith to these two cases.

The Wells-Fargo case, was based upon Section 4 of the Act involved and related to a tax upon *receipts,* both from interstate and intrastate commerce, and the court held it invalid as to the receipts from the interstate commerce.

M. K. & T. v. MEYER, ONLY AN AUTHORITY TO JUDGMENT HERE APPEALED FROM.

The M. K. & T. case was decided by a Federal District Judge of the same authority as the Federal Judge who decided the case at bar, and hence is of no more weight as authority than the case at bar.

STATE COURT HAS HELD MINING TAX IS ONE ON PROPERTY, NOT A LICENSE TAX.

Counsel for appellee in this case approaches the discussion of the question involved in the light of not only Judge Campbell's decision in this case but also of the case of *McAlester-Edwards Coal Co.* v. *Trapp,* 141 Pac. 794, and *In re Assessment Indian Territory Illuminating Oil Company,* not yet reported.

McAlester-Edwards Coal Co. v. *Trapp,*
141 Pac. 794.

This case was decided by the Supreme Court of the State of Oklahoma on April 28, 1914, and rehearing denied June 30, 1914. The court was unanimous in its decision. The case involved the identical question raised here.

We quote the facts as stated by the court (page 794):

> "It is agreed: That the plaintiffs are each an incorporated company, and are engaged in the mining and production of coal upon and from lands which have been segregated by the Secretary of the Interior, belonging to the Chickasaw and Choctaw Nations under leases entered into with the trustees in pursuance of an Act of Congress approved June 28, 1898 (30 Stat. 495, Sec. 13, c. 517, commonly

known as the Atoka Agreement), and of the Act of Congress approved July 1, 1902 (32 Stat. 641, C. 1362), entitled, 'An Act to ratify and confirm an agreement with the Choctaw and Chickasaw Tribes of Indians, and for other purposes.' "

It is Choctaw and Chickasaw coal lands. It is leases operated under the Atoka Agreement. It is the same tax that is challenged here. The same objections are urged, and the cases of *Wells-Fargo* v. *Meyer* and *M. K. & T. Co.* v. *Meyer*, were urged as authorities.

The court set out the contention of the parties as follows (page 795):

"The first contention of plaintiffs is that the law providing for the collection of the tax sought to be restrained is invalid, in that it does not specify the purpose for which said tax was levied; second, that said statute is in contravention of the federal constitution, in that the United States government has sole control over the land where the coal is mined, and by the lease contracts referred to has granted plaintiffs the right to mine such coal, constituting plaintiffs agents of the federal government, and that by the provisions of the law in question an attempt is made to tax its franchise and rights to mine coal conferred under the leases, thereby taxing an instrumentality of the federal government, which tax has the direct effect to hinder, bur-

den, and restrict its intercourse with the Indian tribes. In behalf of defendants, it is the contention of the Attorney General that the tax provided for in said law is not upon any franchise granted to plaintiffs by the federal government, nor a tax upon the pursuit of mining engaged in by the plaintiffs, but that the same is a tax upon the personal property owned by plaintiffs; hence does not in any way burden or restrict the government or any instrumentality of the government in its intercourse with the Indian tribes."

A further reading of the case discloses that the court overlooked none of the fundamental principles of taxation, particularly where the interest of the United States or any of its agencies were concerned. It was fully cognizant of all these matters. Yet, with all these things in mind the Supreme Court of Oklahoma unanimously held the tax imposed was but a *property* tax. Here is what the court said (page 797):

"This law was re-enacted as contained in Chapter 44 of the Session Laws of 1910, wherein it is provided that:

"'Any....person, firm.... or corporation shall, at the time of making its report to the state auditor, set out specifically the amount of royalty required to be paid for the benefit of the Indian citizen, Indian tribe or landlord and in computing said tax shall pay on the actual cash value of the entire gross

production less the royalty paid by such person, firm or corporation.'

"This Section, read in connection with the other sections quoted, clearly shows the Legislature *never intended* to, and did not, impose a tax or burden upon the means of the government in developing and operating the coal mines in question. Neither does this law tax or burden any of the property or royalties in which the government and the Indian tribes are interested. Construing this section in connection with section 8, it is rendered more clear that this was intended to be, and is, only a *property tax.* Said section provides

" 'When satisfactory evidence under oath is produced to the Sate Auditor that any person, firm, association or corporation, engaged in mining, or producing, within this state, asphalt, lead, zinc, jack, gold, silver, copper, or petroleum or other mineral oil have in this state, manufactured or refined any portion of such products in this state, and thereafter on the finished products have paid *ad valorem* taxes, the state auditor is hereby authorized to rebate and pay to such person, firm, association or corporation the just proportion of taxes paid by said person, firm, association or corporation, on his or its crude productions under section six of this act, which shall have been found to have been turned into finished product as aforesaid, and cause such sum, if any, so rebated, to be repaid by warrant drawn on the state treasurer.'

"This section provides that a rebate shall be paid to such firm, person, or corporation

on his or its gross production under section 6 of this act, clearly showing that the Legislature considered that the tax required to be paid under section 6 *was upon the coal as personal property, after it had been extracted from the mines,* and after the royalties had been paid to the government. In other words, the plaintiffs were not required to pay taxes upon the coal *until the coal had been mined and removed therefrom,* and the amount of royalties due under their lease contract paid into the government, or ascertained by a statement to be filed by such lessee, and the amount of such royalty deducted."

The court then re-enforces its position by citation of authorities.

INDIAN TERRITORY ILLUMINATING OIL CO. CASE.

Among these authorities the court cites *In re Assessment Indian Territory Illiminating Oil Co.* (not yet reported). Speaking of this case counsel in their brief say. (Page 40.)

"The opinion in the case of *In re Assessment of Indian Terr. Illuminating Oil Co.,* cited in the opinion of the Oklahoma Supreme Court, has since been withdrawn and is no longer an authority."

In this case the tax in question was not involved. Simply an ad valorem tax on the property of the company was at issue. The company was operating oil leases on lands belonging to

the Osage Indians. It paid royalties for the benefit of the Indians. The contention was that to so tax the property of the company interfered with a federal agency. The court held otherwise.

It held that to tax the property of this company was no such interference. On motion for rehearing it reaffirmed this holding. A second petition for rehearing was recently overruled. It probably had not been acted upon at the time appellant's brief was prepared.

So this case stands as an authority in the case at bar.

One other thing the Indian Territory case settled was that an oil or gas lease could not be assessed on an advalorem basis in this state. Appellant devotes several pages of its brief in trying to reason that because the statute says the tax shall be in addition to the ad valorem taxes on the property of appellant that this is not a property tax. It would almost seem that he is laboring under the impression that the product of these mines are already taxed before they get to the operation of the tax here involved. The coal cannot be taxed under the lease. It can only be sub-

jected to this tax when it is severed from the earth and becomes the actual property of the lessee, and as well pointed out in the McAlester-Edwards Coal case, it is then, and not till then, that the tax becomes operative. As Justice Riddle well says:

> "It is clear this law undertakes to provide a means or standard by which the reasonable fair cash value of the property might be reached."

The decisions in the foregoing McAlester-Edwards Coal case and Indian Territory Illuminating Oil case, together with their reasoning and citation of authorities conclusively establish the fact that this is a tax on property and is not an interference with the federal government in its care of the Indians.

SECTION EIGHT SHOWS ACT IS TAX ON PROPERTY.

The internal evidence of Section 8 is that this is a property tax. There is contained in the provisions of Section 8 of the gross revenue tax of 1910, as well as its predecessor of the Session Laws of 1907-8 and 1909, very strong internal evidence that the mining production tax was regarded by the

Legislature and meant by it to be a property tax solely. Said Section provides:

> "When satisfactory evidence under oath is produced to the State Auditor that any person, firm, association or corporation engaged in mining or producing within this state asphalt, lead, zinc, jack, gold, silver, copper or petroleum or other mineral oil, have in this state manufactured or refined any portion of such products in this state and thereafter on the finished product have paid ad valorem taxes, the State Auditor is hereby authorized to rebate and pay to such person, firm, association or corporation the just proportion of taxes paid by said person, firm, association or corporation, on his or its crude product under section six of this act, which shall have been found to have been turned into finished product as aforesaid, and shall cause such sum, if any, so rebated, to be repaid by warrant drawn on the state treasurer."

Section 6 referred to is the section levying a tax on mineral production. The rebate provided for in Section 8 is an attempt to avoid a duplication of taxation on the same property. The careful limitations of production "in this state" which is manufactured or refined "in this state" and pays an ad valorem tax "in this state" can only be in order that the identical property shall not be taxed in Oklahoma twice. This careful exemption from

taxation where the same property would pay taxes twice, is clearly inconsistent with an intention to tax the producing business as considered apart from the value of the same as property.

The legislature evidently had in mind the provisions of Section 22 of Article X of the Constitution, authorizing it to classify property for taxation, and to value the different classes of property by different means or methods, and it is clear that the classification is but a classification of property, and the mineral tax is but a tax of mineral property.

ARGUMENT TO SAME EFFECT *ab inconvenienti.*

A very strong argument *ab inconvenienti* towards construing the mineral production tax as a property tax arises from the notorious fact as to the nature of the mining properties.

Let it be understood as a matter of which the courts will take judicial cognizance taught by geography, and asserted by multitudes of government reports, that the mining lands of Oklahoma were located in the Indian Territory, and the mineral lands were sought to be set apart from allot-

ment by the Indian Treaties (Atoka Agreement, June 28th, 1898), to be separately administered by the government for the Indians. The Segregated Coal Lands, containing it was supposed and intended the principal coal deposits, set apart from allotment, worked by lessees from the Indian Nations, under the approval of the federal authorities, is a matter pleaded in this case by complainant. Likewise, the mineral oil deposits are principally upon Indian lands administered likewise by the federal authorities.

The lessees of both coal and oil lands in a certain sense are federal instrumentalities. To the extent and no more that Indian traders or lessees of Indian grazing lands are so. The law is settled that the property of such, though on Indian Reservations, are taxable, provided it is not taxed so as to interfere with the federal purpose they subserve.

Likewise the ores and minerals while in the earth upon Segregated or Indian Lands, are not taxable by the State.

But the ore, coal, or oil when severed from the soil is taxable as the property of the non-ex-

empt lessee, citizen of the United States and of this State.

Under these circumstances, especially during the time the vast majority of the real estate in what was Indian Territory, remains inalienable and non-taxable, is it to be supposed that the State of Oklahoma as a matter of convenience, would prefer to place its tax on the privilege of mining or the mined product as property?

If the latter is the method selected, harmony with Section 8 and an effective tax is provided for; but, if the legislature did not mean to levy a property tax but a privilege tax only, then the vast oil industry in Eastern Oklahoma second in importance and value in the United States, exceeded only by California), as well as the large coal industry is probably to go entirely untaxed. And until the Indian lands are taxable, the cities and Western Oklahoma are to bear the burden of government.

A conclusion so unjust will not be reached. As a property tax the tax measured by output is sound.

UNDER AUTHORITIES COMPLAINANT IS BUT LICENSEE.

A coal lease payable in royalty though on government land is taxable property.

Honing Co. v. *Dillon*, 6 L. R. A. (N. S.) 628 (W. Va.).

In *Forbes* v. *Gracey*, Fed. Cas 4924, it was held that ores extracted from mining claims immediately become subject to state taxation, although the legal title to the land is still in the United States, and though mining is to subserve a federal instrumentality.

The same holding was made when the case went on appeal to the Supreme Court of the United States, where it is reported in 94 U. S. 762.

In *Moore* v. *Beason*, 51 Pac. 875, the Supreme Court of Wyoming held that cattle and horses belonging to a post and Indian trader kept on an Indian Reservation, are not exempt from state taxation, because of his character as a post and Indian trader. That he was a mere licensee. The case of *State* v. *Bell*, Phil. N. C. 76, was cited, wherein a merchant licensed by the supervisory agent of the treasury department to trade with the federal army

was held to be subject to state taxation, notwithstanding the fact that he in a sense served a federal purpose.

The same thing was held by the Supreme Court of Montana in *Conder et al.* v. *McMillan,* 56 Pac. 965, that a post or Indian trader is a mere licensee and not an instrumentality of the government to the extent that taxation of his property is an interference with the federal government.

The same thing was held afterwards by the Supreme Court of Wyoming in *Noble* v. *Amoretti,* 71 Pac. 879, in which the previous cases are quoted.

The theory as to the exemption of federal instrumentalities arose first in the case of *Weston et al.* v. *City Council of Charleston,* 2 Pet. 449, in which the authorities of the city undertook to impose a tax upon the bonds of the United States held in the hands of one of its creditors. The power to exempt such from taxation was held not to be the result of any explicit provision of the Constitution, but because otherwise the government of the United States would be impeded in its power of borrowing money under the Constitution.

An example of the converse relation between the Union and the state appears in the case of *Snyder* v. *Bettman,* 190 U. S. 249, in which it was held that Congress had the power to tax a bequest to a municipality in a state and that such taxation would not be interfering with the state instrumentality. This is because the tax is laid upon the property while it is in the hands of the executor before payment and distribution to the legatees.

Likewise in *South Carolina* v. *United States,* 199 U. S. 437, it is held that if the state of South Carolina went into the business of selling liquor that the state government and the liquor business were separate activities, and that a revenue tax could be imposed upon the liquor business without interfering with the power of the state.

Likewise in *Baltimore Ship Building Company* v. *Baltimore,* the decision of the Maryland court rendered in 54 Atl. 623 was affirmed. It is reported in 195 U. S. 375, where it was held that the state might tax a dry dock company, although the dry dock is used principally by the United States. And the court, speaking through Mr. Justice Holmes, said (p. 382):

"But furthermore, it seems to us extrava-

gant to say that an independent private corporation for gain, created by a state, is exempt from state taxation [illegible] its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

In *Thomas* v. *Pacific Railway Co.*, 9 Wall. 691, it was held that corporations engaged in the service of the federal government were not exempt from taxation by the state on that account alone. A distinction was made between the fact that they were the means employed by the government while their property, though it was the property of agents employed by the government, was not the government's property. It was said:

> "In respect to property, business and persons within their respective limits, the power of taxation of the states remained, and remains entire, notwithstanding the Constitution."

Lane Co. v. *Oregon*, 7 Wall. 77, was cited. And it was added:

> "It cannot be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the constitution. To hold that would be to deny to the states all power to tax persons or property. Every tax levied by a state with-

> draws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The states are, and they must ever be, co-existent with the national government. Neither may destroy the other."

If this opinion had been rendered after the opinion of this court in *Flint* v. *Stone Company*, 220 U. S. 120, it might have been pointed out that under a federal occupation income from every source is considered in measuring the tax, and thus any kind of tax or any kind of lease upon a business that should pay that tax would in so far be an interference with the taxing power of the United States.

It was said in the Thomson case that an exemption from state taxation, of agencies of the national government depends not on the nature of their agency, but "whether the tax does in truth deprive them of the power to serve the government as they were intended to serve it." The Union Pacific was a federal corporation to transport troops, dispatches, mail and munitions; it was granted land, aid and bonds, and the government through directors took some part in the actual management and administration of the road.

Next, in the case of *Railroad Company* v. *Peniston*, 18 Wall. 5, it was reiterated that it cannot be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the constitution, and the distinction was made between a tax on the property of a corporation, and those operations of the company which were to be for the use of the government. Notwithstanding that the railway in that case was a governmental instrumentality, yet it was pointed out that its property was subject to state taxation, provided only that none of the activities of the railway were taxed in which it was designed to serve the government in such a way as to hinder that service.

In view of what is said in both the Peniston and Thomson case, it must be understood that emphasis is to be made upon the question of whether the hindrance is remote or direct.

This distinction is more clearly pointed out in the earlier case of *First National Bank* v. *Commonwealth of Kentucky*, 76 U. S. 353 (9 Wall.).

In that case it was held that the shares of stock in a national bank are taxable to the stockholders, and, with reference to *M'Culloch* v. *Mary-*

land, 4 Wheat. 316, that the principle of the exemption of federal agencies from state taxation a limitation growing out of the very principle itself upon which it was founded. In that the exemption was but the outgrowth of necessity, and therefore that necessity was to limit its application. This limitation was that the exemption from taxation was one to serve the efficiency of the government, and not for the profit or benefit of private individuals. Shares in a national bank should be taxed, but the bonds owing by the United States, owned by the bank, could not be taxed. In *M'Culloch* v. *Maryland* the tax was laid upon the very issue of paper.

The question of remoteness or directness was next emphasized in *Utah & Navigation Co.* v. *Fisher,* 116 U. S. 28, in which it was held that a railway to which Congress had granted right of way across an Indian Reservation in a territory was as to its property on such right of way taxable under the laws of the territory, and this holding was repeated to the same effect in *M. & P. Co.* v. *Arizona,* 156 U. S. 347. Yet the very right of way across these reservations was granted by the United States to serve a federal purpose.

Cherokee Nation v. *Southern Kansas Ry. Co.*, 135 U. S. 641.

It therefore does not follow that either a tax on a federal instrumentality or other tax which in a remote way interferes with a federal purpose, is void.

In *Western Union Tel. Co.* v. *Mass.*, 125 U. S. 549, it was held that a telegraph company, granted a franchise under an act of Congress of 1866, and engaged in interstate business, could be taxed by the state nominally upon the shares of its capital stock, divided in proportion to the length of its lines within the State of Massachusetts, even though these shares of capital stock represented that part employed in interstate business. It was said that this was merely a method of measuring the value of its property; the remote effect that it had upon interstate commerce did not render it void.

In *Ficklin* v. *Shelby Co.*, 145 U. S. 1, a license to do a general commission business both intra and interstate, though graduated on the profits from both, was held valid, and it was not conceived that this was an interference with interstate commerce sufficiently direct to render the tax void.

In *Reagan* v. *Merc. Tr. Co.*, 154 U. S. 413, it was said that a railway incorporated by Congress was as to its intrastate rates and the police laws of a state through which it operated subject to such laws, and this was notwithstanding, that such matters might remotely affect interstate commerce.

In *Postal Tel. Co.* v. *Adams*, 155 U. S. 687, at page 696, it was said:

> "But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax imposed on the corporation on account of its property within the state, and may take the form of a tax for the privilege of exercising its franchise within the state."

In *N. Y. L. E. & W. Co.* v. *Penn.*, 158 U. S. 431, it was held that a state had power to tax toll or rentals paid to one road by another for the use of the track for commerce both inter and intra state.

It was said (p. 437) that the federal power was not inconsistent with the power of the states "to tax the franchises, property or business of its own corporations" engaged in intrastate commerce, "nor with the power to tax foreign corporations on account of their property within the state."

This case, together with the one immediately preceding, at least made that distinction very clear.

In *Central Pacific* v. *Cal.*, 162 U. S. 125, it was again pointed out that the property of federal agents might be taxed, and that all privileges received from the taxing state might be considered as a part of its property there located.

In *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, a tax on the property of an interstate bridge which was to some extent affected by the amount of interstate tolls, was held valid.

In *Thomas* v. *Gay*, 169 U. S. 264, it was held that cattle grazing on lands leased of Indians might be taxed, even though the lease provided that the herders should be Indians, and although it was clear that the purpose of the laws was to lead to the education of the Indians in the ways of the white man. It was held that unless the tax was upon the rent received by the Indians, it was not on the Indians' land, and it was said:

> "It is not perceived that local taxation, by a state or territory, of property of others than Indians would be an interference with congressional power."

In *Wagoner et al.* v. *Evans et al.*, 170 U. S.

586, it was held that cattle grazing on leases on Indian reservations authorized by Congress, yet were taxable.

In *Montana Catholic Mission* v. *Missoula Co.*, 200 U. S. 118, it was held that property of a mission to Indians on a reservation was taxable, though the mission was solely for the education of the Indians, and was permitted to be where it was by the government of the United States solely because it assisted in the purposes of the federal government.

These decisions will emphasize the enormous inconvenience of a construction of the mining tax as a privilege rather than a property tax.

From every point of view it is clear that the mining tax should be construed as a property tax.

TAX BEING ON OUTPUT, LESS ROYALTY, ARGUES IT A PROPERTY TAX.

Corroborating evidence that the mining tax is upon property only measured by activity is found in the last words of Section 6:

> "Provided, that any such person, firm, association or corporation shall at the time of making its report to the State Auditor, set out

specifically the amount of royalty required to be paid for the benefit of the Indian citizen, Indian tribe, or landlord and in computing said tax shall pay on the actual cash value of the entire gross production less the royalty paid by such person, firm, or corporation."

This is evidence, first, that the legislature had in mind the Indian ownership by tribe of the segregated lands, and by allottees of the oil lands; second, that leases on the same were by law of the United States paid in royalty on production; and third; that such royalty as a part of the federal machinery for supporting and protecting the Indian was exempt from state taxation. Let us also note that royalty is payable in kind, not currency. The meaning, therefore, is plain. It is this: "Subtract from your production, the royalty (payable in kind), exempt from taxation (as a federal instrumentality), and pay taxes on the balance as property."

ROYALTY.

Beginning on page 58 of brief appellant complains that in the Acts of 1907-8-9 no exception of royalties was mentioned.

The McAlester-Edwards Coal case settles this point adversely to appellant.

In that case the taxes involved were for the same years as here. Yet this is what the court said:

> "This whole law, relative to gross revenue taxes, was re-enacted by the Legislature, and is contained in the Session Laws of 1910 by an act of the Legislature approved March 10, 1910, Sess. Laws 1910, c. 44, p. 65. The provision, in so far as is applicable here, is practically the same, with a proviso, however, at the end of section 6 as follows:
>
> " 'Provided, that any such person, firm, association or corporation shall at the time of making its report to the State Auditor, set out specifically the amount of royalty required to be paid for the benefit of the Indian citizen, Indian tribe or landlord and in computing said tax shall pay on the actual cash value of the entire gross production less the royalty paid by such person, firm or corporation.'
>
> "While this amendment became effective after the agreed case was filed, yet it was in force and effect long prior to the time said cause was heard and final judgment rendered in the trial court, and is a remedial statute, and should be given a restrospective effect. 36 Cyc. 1209, and cases cited."

PURPOSE OF TAX

On page 63 of brief appellant contends the purpose of the tax is not specified.

In the McAlester-Edwards Coal case the court said on this point (page 796):

> "As to the first ground raised by the plaintiffs, that said law is invalid and contrary to the provisions of the constitution of Oklahoma, in that it fails to specify the purpose for which said tax is levied, etc., is not well taken. This point has been settled adversely to the contention of the plaintiffs by this court in the cases of *Binion* v. *Oklahoma Gas & Elec. Co.*, 28 Okla. 356, 114 Pac. 1096, and *McGannon* v. *State*, 33 Okla. 145, 124 Pac. 1063. Hence this point need not be noticed further."

Appellant then attempts to show that the cases cited by the court really did not settle the question. However, we are confident a reading of those cases sustains the court's statement.

The bill of complaint in the case at bar was filed July 19, 1909. The Act of 1907-8 was amended by the act approved and effective March 27, 1909. Section 2 of this amendment is as follows:

> "All funds arising under the provisions of Article II., Chapter 71, of the Session Laws of 1907-1908, shall be paid into the State Treasury and shall be credited to the general revenue fund of the state for the payment of the expenses of the state government."

This amendment being operative before the

case at bar was filed certainly destroys appellant's contention on this point.

There can be no question but that the action of the trial court was correct and should be affirmed.

CHAS. WEST,
Attorney General of Oklahoma.